S. HRG. 101-254

REVISING THE DISTRICT OF COLUMBIA'S CIVIL CONTEMPT STATUTE

HEARING

BEFORE THE

SUBCOMMITTEE ON GENERAL SERVICES, FEDERALISM, AND THE DISTRICT OF COLUMBIA

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 1163

TO AMEND THE DISTRICT OF COLUMBIA CODE TO LIMIT THE LENGTH OF TIME FOR WHICH AN INDIVIDUAL MAY BE INCARCERATED FOR CIVIL CONTEMPT IN A CHILD CUSTODY CASE IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA AND TO PROVIDE FOR EXPEDITED APPEAL PROCEDURES TO THE DISTRICT OF COLUMBIA COURT OF APPEALS FOR INDIVIDUALS FOUND IN CIVIL CONTEMPT IN SUCH A CASE

JULY 21, 1989

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REVISING THE DISTRICT OF COLUMBIA'S CIVIL CONTEMPT STATUTE

FRIDAY, JULY 21, 1989

U.S. SENATE,
SUBCOMMITTEE ON GENERAL SERVICES,
FEDERALISM, AND THE DISTRICT OF COLUMBIA,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Jim Sasser, Chairman of the Subcommittee, presiding.

Present: Senators Sasser, Lieberman, Stevens, and Heinz.

OPENING STATEMENT OF SENATOR SASSER

Senator SASSER. The Subcommittee will come to order.

Today the Subcommittee on General Services, Federalism, and the District of Columbia will consider two bills, S. 1163 and H.R. 2136.

Now, both of these bills, in different ways, amend the civil contempt process in the District of Columbia. Although the issues raised by these bills are important and they are sensitive, I must be very frank and candid in stating that the effort undertaken here today, at least on the part of the Chairman, is to free Dr. Elizabeth Morgan.

Dr. Morgan has been incarcerated for refusing to disclose the whereabouts of her daughter, and her incarceration raises fundamental questions with regard to the guarantee of due process.

The legislation before us deals with these questions in necessarily general terms, but we must take note of the fact that Dr. Morgan has not been accused of a crime, she has not received the benefit of a trial, yet she has been jailed for an indefinite period of time for refusing to break her silence and provide information ordered by the court in a child custody case.

During some 20 months of imprisonment, Dr. Morgan has had to endure the trauma of being incarcerated in the same jail with persons accused of dealing in drugs, participating in prostitution, and carrying out a whole range and assortment of violent crimes.

Now, we are not here to conduct judicial proceedings, or to look into the facts surrounding a particular child custody case. That is beyond the jurisdiction of this Subcommittee. But we obviously would not be examining this legislation at all if it were not for the extreme, and I think unfortunate, circumstances of the Morgan case. And I would feel remiss if I did not state my own view that

Dr. Morgan has been in jail long enough. In my judgment, the time has come to meet this issue head on and to take action to end her incarceration.

Now, we must consider then whether it is appropriate to place a cap on civil contempt, or do we create another mechanism to limit the period of incarceration. Accordingly, this hearing will consider the broader questions of whether the law governing civil contempt proceedings might be improved in a way that will protect individual rights and liberties, yet at the same time ensure that the courts have adequate authority to enforce their orders. As one who practiced law for 15 years, I know how important that is, particularly in domestic relations cases.

Now, civil contempt proceedings are an unusual feature in our legal system. Under existing civil contempt authority in almost every jurisdiction—not in all, but in almost all—a single judge can incarcerate a person for disobedience of a court order for an unlimited period of time without what we have come to regard as the characteristic due process protections that are usually required before depriving a person of his or her liberty.

The response that many times is given is that the individual incarcerated has the key in their own pocket to unlock the cell door if they so wish by simply complying with the court order.

Now, I am not suggesting for one moment at all that judges are given to abusing this broad and unfettered judicial discretion, because I don't believe that. But the infrequency of abuse does not mean that such authority should continue completely unchecked and completely without review. The genius of our Constitution and the goal of the American legal system is the ability to minimize and avoid the potential for the abuse of power. That is what the Constitution of this country is really all about, in my judgment.

Yet, we also recognize that a society operating under the rule of law does require that a judiciary have authority not only to make decisions, but also to enforce those decisions.

We look forward today to hearing testimony about both the need to preserve judicial authority and, at the same time, the need to protect due process and individual rights.

Before turning to our witnesses this morning, I would like to turn to my distinguished colleague from Alaska, Senator Stevens, for any statements or observations that he might wish to make at this time.

OPENING STATEMENT OF SENATOR STEVENS

Senator STEVENS. Mr. Chairman, I am pleased to join you and I am looking forward to hearing our colleague, Senator Hatch. I have studied his bill and the House bill. I have been a practicing lawyer for many, many years now, and I think Senator Hatch has a real point in his bill. I would not support the House bill, but I do believe that Senator Hatch's bill is going in the right direction and that we must find a way to, in effect, assure that the time arrives when an individual has his or her rights determined by a jury, rather than having a perpetual concept of incarceration for contempt.

I am pleased to be with you this morning.

Senator SASSER. Thank you, Senator Stevens.

Our first witness this morning will be our distinguished colleague from Utah, Senator Hatch, the sponsor of the Senate bill. And I might say that following Senator Hatch's testimony we will hear from the Honorable Peter J. Messitte, Associate Judge, Circuit Court for Montgomery County, Maryland, a very distinguished jurist in that jurisdiction, for a judicial perspective on this issue. And finally, we will hear from Professor Doug Rendleman from Washington and Lee Law School, who is coauthor of a legal case book that deals with the issue of civil contempt.

I might say before you begin, Senator Hatch, that we have heard from many other groups and a great number of legal scholars who are interested in commenting on the bills that are before us today, but they were not able to be here today.

In addition, we have been contacted by still others who have requested to testify in person, and I must say that, quite frankly, time constraints prevent this Subcommittee from hearing live testimony from all who would wish to give it. If we heard from all who wanted to testify live, we might be here for a week.

However, in order to accommodate all of those who wish to offer the benefit of their insights—and we value their insights—we will be leaving the record open for 10 days until Monday, July 31, to receive comments from any interested parties.

Before turning to Senator Hatch, I note we have been joined by our colleague, Senator Heinz.

Do you have any comments or observations you would like to make at this time, Senator Heinz?

Senator HEINZ. Mr. Chairman, no, not at this time. I do have a statement that I would like inserted into the record at this time.

[Senator Heinz' statement follows:]

OPENING STATEMENT OF SENATOR HEINZ

Mr. Chairman, I commend you for calling this hearing on legislation to revise the District of Columbia Code by limiting the length of time an individual may be incarcerated for civil contempt in a child custody case in the District of Columbia Superior Court.

This hearing is on a sensitive and important issue. It is an issue we cannot take lightly because we are dealing with individual rights as well as to the proper operation of our judicial process.

We are all aware of the attention focused on this issue in recent weeks, and I welcome this opportunity to hear from our witnesses as to the merit or objections surrounding this legislation.

As drafted, Senator Hatch's legislation would effect only child custody cases adjudicated in the District of Columbia. In light of the child custody focus, first and foremost, my attention and concern will be toward the best interest of the child—what is best, in both the short and long term. My bottom line is what is best for the youngster(s).

Secondly, I look to our witnesses for their legal expertise and insight into questions concerning this legislation and the impact its enactment could have on an individual's due process rights under the Constitution as well as maintaining contempt proceedings as a tool of the court to bring about the proper administration of justice.

Anticipating thoughtful comments by this morning's witnesses, it is my desire to carefully and cautiously weigh the facts surrounding this sensitive issue, and determine the best course of action—keeping at the forefront of my mind the health, safety, and well-being of a child or children in emotional, custody case situations.

Thank you, Mr. Chairman.

Senator SASSER. Thank you very much, and I want to welcome our distinguished colleague, Senator Orrin Hatch from Utah, before us today. We had a very late night last night, I think the Senate finally adjourned about 1:15, but I note that Senator Hatch looks fresh as a daisy this morning. Senator Hatch.

TESTIMONY OF HON. ORRIN G. HATCH, U.S. SENATOR FROM THE STATE OF UTAH [1]

Senator HATCH. I just wish I felt fresh as a daisy.

Mr. Chairman, I am very grateful to you and to the other members of this Committee for holding this hearing with such dispatch. I think it is time to resolve this problem, and there is no use kidding, my particular bill, as well as that of Congressman Wolf and others in the House, is motivated by the Elizabeth Morgan case, although we would like to, I think, correct the law in this area as well. So we appreciate your doing this.

And Senator Stevens, I appreciate your cosponsorship of the bill. That means a lot to me.

What my bill does is it imposes a 12 month cap on imprisonment in civil contempt and child custody cases only in the D.C. Superior Court.

The purpose of civil contempt, of course, is to coerce compliance with a court order, and my bill simply recognizes that after an entire year in prison, the contemnor in a child custody case is being punished and not persuaded. We are not talking about hardened criminals here. The bill applies only to child custody cases, which usually involve basically honest disagreements between honest people who don't represent a threat to society, and that is the usual case.

And I am not going to pass any judgment as to who is right or who is wrong in this particular case. What I am most concerned about is the welfare of the children, who are the ones who are hurt more than anyone else in these cases. The protective parent is incarcerated for refusing to give her child to the other parent, and the child is thus deprived of both parents. And in this case, that has certainly happened. Dr. Elizabeth Morgan defied a court order to deliver her daughter, Hilary, to her ex-husband, Dr. Eric Foretich, for an unsupervised visit, claiming that Foretich had sexually abused Hilary during past visits.

On August 28, 1987, Dr. Morgan began serving an indefinite jail sentence for contempt of court. She has now spent nearly 2 years in jail. And my answer to that is enough is enough. Dr. Morgan has served longer than many convicted criminals, even though she endangers no one. Scarce jail space could be better used. Her medical practice, home, and other assets have disappeared and she is now the longest residing female prisoner in the D.C. Detention Center.

After she had been incarcerated for 16 months, Judge Dixon said, "The coercion has only just begun." Had she been imprisoned for criminal contempt in Federal Court, her initial sentence would have been for a definite period and a jury trial would have been

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[1] See p. 35 for Senator Hatch's prepared statement.

required to incarcerate her for more than 6 months. Now, however, she is still serving indefinitely under these circumstances, and I think that is wrong.

On Friday, June 9, 1989, Dr. Morgan's brother, Robert M. Morgan, appeared before Judge Dixon, pursuant to subpoena, and refused to divulge Hilary's whereabouts. Judge Dixon took no action against Mr. Morgan, but noted that he could be jailed for contempt. Now, will the judge jail Dr. Morgan's relatives ad seriatim over the next 12 years before determining that she will not be coerced? Enough is enough.

Now, I take no position, as I have said, on the merits of the Morgan case, but I believe in a child custody case the civil contempt power can be abused. My bill represents a reasonable, I believe, and indeed necessary exercise of Congressional authority. The D.C. Council is simply not empowered to order the authority of the D.C. Superior Court. Under the Home Rule Act and the D.C. Charter, only Congress can supply that particular remedy.

H.R. 2136, the District of Columbia Civil Contempt Imprisonment Limitation Act of 1989, passed the House on June 28 by a vote of 376 to 34. D.C. Delegate Walter Fauntroy was among the bill's cosponsors, and I think that indicates some of the force behind the desire to resolve this matter.

In my opinion, S. 1163 is preferable to the House bill. My bill would apply only to child custody cases, while the House bill will apply to all civil cases. Since no abuses have been identified outside the child custody context, there is no reason to interfere in the judge's authority in such a broad range of cases.

Indeed, a judge must justifiably feel that contemnors outside of the child custody context, such as drug dealers, or organized crime figures, are still capable of being coerced into compliance after 12 to 18 months, and I would not tie the hands of the D.C. judges based on the record before Congress.

Now, Mr. Chairman, I have other matters I would like to put in the record. I would like my formal statement put in the record.

Senator SASSER. It will be included in the record.

Senator HATCH. I would be happy to answer any questions you might have.

Senator SASSER. Well, thank you very much, Senator Hatch.

We have been joined by Senator Lieberman. I turn to our colleague, Senator Lieberman, and ask him if he has any observations or comments or an opening statement this morning before propounding any questions to Senator Hatch.

OPENING STATEMENT OF SENATOR LIEBERMAN

Senator LIEBERMAN. Thank you, Mr. Chairman. I appreciate your courtesy. As a member of the Hastings Impeachment Panel which is meeting now, I have to go back to that, but I did want to take a moment to stop by very briefly.

I have a statement which I would like to have entered into the record which records my support for S. 1163, based, if I may say, very briefly, on my own sense that there is a danger that the civil contempt procedure will be used as the criminal contempt proce-

dure is but without some of the protections that are built into criminal contempt, and that is unfair.

Secondly, I would say that in my time as Attorney General of Connecticut I became very much aware of the importance of using civil contempt in child support cases—child support collection was one of the areas of responsibility that our office had. Almost always, however, it took only a very brief period of incarceration to elicit a response, the renewal of child support payments, and never the kind of unlimited use of civil contempt which has been seen in the case that I know has brought this bill before us.

So I think there is a door here that the law has allowed to remain open through which injustice can go, and I believe strongly that we ought to close that door.

I thank you, Mr. Chairman, for giving me the opportunity to say these few words.

Senator SASSER. Thank you, Senator Lieberman.

Senator HATCH. Thank you, Senator Lieberman.

[The prepared statement of Senator Lieberman follows:]

PREPARED STATEMENT OF SENATOR LIEBERMAN

Today this Subcommittee considers legislation to limit the length of a time an individual can be incarcerated for civil contempt under District of Columbia law. This legislation is undeniably prompted by the difficult and troubling case of Dr. Morgan, yet it has ramifications which reach far beyond this case. We may find the facts of Dr. Morgan's case very disturbing, we may worry about where her daughter is and when, if ever, this child will be able to lead a normal life, but we are not here to reach judgment on the facts of that case. We must look at her case, at the fact that Dr. Morgan has now spent over 22 months in prison, as an example of the consequences of allowing unlimited incarceration for civil contempt.

I am troubled by the question of when civil contempt in fact becomes criminal punishment. I certainly believe that a judge should have the power to imprison a recalcitrant witness, an individual who has not complied with a court order, or a parent who has not paid child support or allowed visitation. The value of civil contempt is precisely the threat of a lengthy prison stay; however, a judge should not have the power to incarcerate an individual forever without any limitation or checks on this decision. After a certain amount of time we must ask, does the goal of coercing compliance still exist, or has this incarceration become punishment without benefit of due process and the safeguards of a criminal contempt proceeding.

Criminal contempt allows us to imprison individuals for long periods of time; however, it also ensures that the individual is not imprisoned without a trial by a jury and the protections of due process. It is difficult for me to believe that a parent who has been willing to spend 22 months in jail will be coerced by additional months behind bars. It may, however, be true that the parent should be punished by additional time in prison, and this can be accomplished under criminal contempt proceedings.

I have studied the issue of child support very closely, and know the value of civil contempt in encouraging a parent to pay the money owed. I also know that the threat of prison is usually sufficient to move the parent to action. A brief period of incarceration almost always induces compliance with the child support order. I do not think that a 12- or 18-month limitation on civil contempt will adversely affect our ability to enforce child support laws.

Simply put, civil contempt need not be unlimited in order to be an effective tool for the judicial branch. The bill before this Committee would ensure that individuals will not be incarcerated indefinitely without due process of law and it deserves our careful attention and our support.

Senator SASSER. Senator Hatch, I note that your bill will place a 12 month cap on civil contempt in child custody cases only whereas the House bill has broader jurisdiction, broader application. And I

was wondering why, what the rationale is for not extending the cap to all civil contempt cases?

Senator HATCH. Well, first of all, there may be the need for the judge to go beyond 12 months with regard to certain criminal activities, certain other activities. In the area of child custody—and we limit it to child custody—I think to go beyond that there is punishment and officious activity on the part of the judge.

What we would like to do, and we see no reason except in this particular set of circumstances, to make the statute that broad, we think the judge does need broad power, but in child custody cases, certainly this has gone on way too long. And this is not just for the benefit of Dr. Elizabeth Morgan. It certainly would benefit her, it certainly would release her.

On the other hand, it would benefit all people who are similarly situated where you have a judge who is just indefinitely keeping somebody in jail when that person surely is not going to change.

The 12 months, also, it seems to me, is a long enough time for most people to comply with the court order, and I think if somebody like Dr. Morgan is not going to do it within 12 months, they are not going to do it, period.

Senator SASSER. It is my understanding, Senator Hatch, and you may or may not be aware of this, and I can direct this question to our law professor or our jurist later if you do not, but it is my understanding that two jurisdictions do place a cap on civil contempt, do they not?

Senator HATCH. It is my understanding that there are jurisdictions that do, I don't know that they are limited to two.

Senator SASSER. Senator Hatch, the Chairman of the full Committee, Senator Glenn, has some questions which he has asked me to propound to each witness, and I will submit them for the record as far as you are concerned and ask that you reply to these questions at your earliest convenience.

Senator HATCH. That would be fine. I would be happy to answer them here if you would like.

Senator SASSER. Senator Stevens?

Senator STEVENS. Senator, do I interpret your bill correctly that you are not proposing any restrictions on the criminal contempt procedure?

Senator HATCH. That is right, the judge would still have criminal contempt process.

Senator STEVENS. And there is no gender differentiation in your bill—it is a limitation on custody matters and it would equally apply to a husband as well as a wife?

Senator HATCH. That is correct.

Senator STEVENS. And there is no limitation on the power of a court that sees the end of this 12 month period coming from proceeding with a criminal contempt matter; that court is not forced to release the person in order to proceed with criminal contempt?

Senator HATCH. That is true, but I believe in the case of Elizabeth Morgan it would be very difficult for the judge to do that under the circumstances.

Senator STEVENS. I agree with you because of the length of this one.

Senator HATCH. That is right.

Senator STEVENS. But if a judge was in a situation where he reached the end of the 12 month period and decided that there was reason to present such a matter formally and have a jury involved, he could proceed while still maintaining that person in jail under the original 12 month limit and attempt to have a jury determine whether it was such a flagrant case that the person should continue with incarceration.

Senator HATCH. That is true, but I think a judge in a case like the Morgan case, or any child custody case, if the judge does not move for criminal contempt far before the 12-month period, I think he would be in a real bad position to do so then just as an add-on to the 12-month period.

So literally, he is going to have to come up with some real reasons, real justification for a criminal contempt charge, but we leave all of that intact; that is right.

Senator STEVENS. I agree. It would mean that the merits of the judge's determination of what constituted contempt would be reviewed by a jury if the person was going to continue to be held in jail for that.

Senator HATCH. That's right. In the case of Dr. Morgan, if the judge tried to do that—if we pass this statute—which would be tantamount to releasing Dr. Morgan, and he does that, I would be outraged.

Senator STEVENS. I understand that, but there would be nothing in this bill that would prevent that judge from proceeding with criminal contempt——

Senator HATCH. That's right.

Senator STEVENS [continuing]. If he decided to do so?

Senator HATCH. That's right. But then——

Senator STEVENS. I have got to tell you, I have not gone into the merits of the judge's decision. I agree with you in terms of the time factor of being incarcerated for civil contempt.

Senator HATCH. That's right.

Senator STEVENS. And I congratulate you for taking the lead on this.

Senator HATCH. Well, thank you, and I might add that if the judge does decide to use his criminal contempt power, then there are other procedural benefits for the defendant at that time, such as a right to a trial by jury. So all of these rights are protected.

Senator STEVENS. Those rights are protected by your bill.

Senator HATCH. That's right.

Senator STEVENS. But the judicial process is similarly protected if the judge feels that this is such a case.

Senator HATCH. That's correct, and it should be, in my opinion.

Senator STEVENS. I thank you, very much, thank you, Mr. Chairman.

Senator SASSER. Senator Heinz?

Senator HEINZ. Senator Hatch, the major difference—in addition to the fact that your bill applies only to child custody cases—between your bill and the House bill, is that the House bill, as I interpret it, basically says to a judge, there will be a 12 month limit on any incarceration following a civil contempt finding, and then if you want to go beyond that, within the window of 6 to 12 months from the time you first jail the defendant, you will have to insti-

tute criminal proceedings. Then there is a speedy trial procedure and so forth.

You do not provide for that kind of approach, as I understand it.

Senator HATCH. That's right.

Senator HEINZ. Would you care to discuss the merits of one approach versus the other? I happen to know you to be one of the smartest men on Capitol Hill and one of the most distinguished attorneys ever to serve on Capitol Hill, so I would appreciate your thoughts on why you did not go the way the House bill did.

Senator HATCH. Well, that is nice of you to say.

There are a number of differences, that certainly is one, but they are still similar in approach, because the House bill does not limit the civil contempt to child custody cases, my bill does. They apply their law to all civil cases. I think that is too broad. I think we may very well be causing a lot of problems if we go that far. I explicitly state in our bill that ours is retroactive so that it definitely takes care of the Morgan case. The House bill is not explicit, but it is certainly the intent of the bill, and I think it would be interpreted as such.

Ours represents a reasonable compromise. Many judges want minimal or no impingement on their contempt power, and many academics want sweeping reform.

My bill makes a sensible reform in just one limited class of cases, where the House bill is much broader. Ours is a simple 12 month cap, and it is a cumulative cap; the House is a 12 month consecutive cap. And to me, I think ours is superior in that regard also.

Both bills apply only to the District of Columbia. The House bill could be interpreted as a statement of Congressional disapproval or skepticism towards the contempt power generally, and that bothers me, because I think the contempt power is a very important power and judges should have it. And I don't want anybody misconstruing what the House wants to do, but it could be viewed or interpreted as a statement of Congressional disapproval, and I think that would be wrong. And I think the record before the Congress does not indicate any need for such a sweeping reform.

Now, wouldn't it make sense to adopt the House's approach providing that continued disobedience of an order after the 6 consecutive months of imprisonment for civil contempt may be prosecuted as criminal contempt, to get directly to your question. I think that provision is unnecessary.

Nothing in my bill prevents a judge from using criminal contempt instead of civil contempt. If a sanction longer than one year is needed, it is still available under the criminal contempt power, even under my bill, so long as the constitutional protections are afforded to the contemnor. And when I decided to introduce a civil contempt bill, I considered this sort of arrangement, as well as several other alternatives to a flat cap, and I decided to go with the flat cap because of its simplicity and clearness, and I think, fairness.

So I would free Dr. Morgan, and my bill would free Dr. Morgan. It would protect future contemnors in her situation, whether male or female, whether husband or wife, and it would solve the problem in these areas, I think, in an appropriate and efficient way.

There are lots of other differences between the two bills, but I think it is a simple way of doing it.

The only thing I would ask, Mr. Chairman, is that I would hope you don't keep the record open that long for statements, but that you get this bill reported out before we go on recess, because I don't see any reason for this doctor to be in jail any longer. And I think if we report this bill out, then we could have a conference, or ask the House to take this bill and get it done before August so that this doctor can be freed from this type of, I think, very onerous jailing.

Senator HEINZ. Senator Hatch, I want to return to the question I originally asked you. That was a brilliant exposition of all the differences in the bill——

Senator HATCH. Well, that is not all of them.

Senator HEINZ. I am well aware of all the differences, but I do want to come back to the issue I asked you about.

It seems to me that you could make the argument, because of the structure of the House bill, that it does a somewhat better job of balancing two competing forces here. The authority of the judge to insist that when he is ordering a defendant or a witness within the authority of the court to do what they should, the House bill undercuts that authority less than a simple 12-month cap because it envisages in a sense, a due process system, that is, a system of due process that is unbroken. Whereas, under your approach, there being, for example, no right to begin a trial within 90 days, a criminal proceeding. It might well be, that the individual comes to the end of their 12 month period of incarceration, then they would be released with all the attendant complications that might arise thereafter.

Your approach, on the other hand, obviously, in one sense, is simpler, but it does seem to me that by breaking the chain of process, one could consider it something like a reverse Bill of Attainder. Bills of Attainder, we all remember what they were from 1215 and thereafter. This is almost—yours says that we are going to free people at 12 months, come hell or high water. Bills of Attainder said we are going to put them in jail, come hell or high water.

And how would you react to that kind of an analysis of the differences.

Senator HATCH. That is an interesting comment about a reverse of a Bill of Attainder. I would say this, there are advantages to the House bill, and maybe I should be more explicit about those. But the bills would work very similarly with regard to criminal contempt. They do specify how that will work.

Our bill just assumes it will work, and if the judge wants to use that, he has got to follow certain prescribed guidelines within his jurisdiction to do that, and he can do that, and he is subject to, as I recall, the Speedy Trial Act, et cetera.

So, it would not work that much differently than the House bill. If I were to advance the advantages of the House bill, I would say, number one, the advantage of the House bill is that it generally is a good rule to apply laws universally and across the board to everybody.

On the other hand, if you do do that and you have a 12 month cap on civil contempt across the board——

Senator HEINZ. Well, let me make your statement easier. I am persuaded that we should adopt the Hatch principle of limiting this to child custody contempt cases, so you don't need to make that point for a third time.

Senator HATCH. OK.

Senator HEINZ. Unless you want to change my mind.

Senator HATCH. No, no. I would be happy to withdraw any further comment about that.

Senator HEINZ. It is really a question of—at least this Senator is concerned—how we should approach the process.

Senator HATCH. I would say this, another advantage, it depends on your point of view, but while the parent-child relationship merits special regard, the potential for abuse of the civil contempt power exists in all civil litigation, they will say, not only in child custody cases.

If present law regarding civil contempt arguably permits infringement on individual liberty, which would be violative of the due process clause, these are as serious as any other civil case, as they are in a child custody context. But I don't think that is what you need to do here today, and especially since there are really no facts that would impel you towards that decision. And then they could argue that a law of general application makes Congress less likely to be perceived as extending an ex post facto proposal to Dr. Elizabeth Morgan.

I would have to say, the intent is not merely to free Dr. Morgan, although that is certainly part of it, but to fix the law in this case.

There are other advantages of S. 1163 that I think overweigh all of these advantages. One of the advantages of H.R. 2136 is that it allows continued incarceration of contemnors who shouldn't get out after only one year, and that is an advantage. Some feel it more directly meets the due process objections to the current practice.

In criminal contempt there is already a requirement that imprisonment may not continue for more than 6 months without a jury trial. So civil contemnors should receive the same protection, and, you know, there, I suppose, are others.

But, to make a long story short, I think that the appropriate way to do this, the quickest, best way to do it, the way it is less complicated, is to do it in the simple form that we have done it in this bill. So I am very appreciative that you are supportive of it and I hope that we can get it out and get it passed before August.

Senator HEINZ. No further questions, Mr. Chairman.

Senator SASSER. Thank you, Senator Heinz.

Thank you, Senator Hatch. And I might say that it is my intention to get this bill out in a timely fashion and have it to the floor before we adjourn in August.

Senator HATCH. If we could, if we allow enough time for the House to act too, it would really be wonderful to have this matter resolved, it seems to me, and I would feel good for all parties concerned.

Senator SASSER. All right.

Senator HATCH. Thank you, Mr. Chairman, and thank you, Senator Heinz.

Senator SASSER. I thank you for your testimony this morning here, Senator Hatch.

Our next witness this morning is the Honorable Peter Messitte, the Judge of the Circuit Court of Montgomery County, MD.

Judge Messitte, we welcome you before the Subcommittee this morning. It is a pleasure to see you again, and we look forward to the benefit of your testimony.

TESTIMONY OF JUDGE PETER J. MESSITTE, CIRCUIT COURT FOR MONTGOMERY COUNTY, MD [1]

Judge MESSITTE. Mr. Chairman, thank you. I am Peter J. Messitte. I am an Associate Judge for the Sixth Judicial Circuit of Maryland. We sit in Montgomery and Frederick Counties, which are neighboring counties to the District of Columbia.

I, as do my colleagues, sit in both civil and criminal cases and that includes, of course, domestic cases.

I might add that when I was in practice, I did a substantial amount of domestic work and did have some practice in the District of Columbia, so perhaps I am an appropriate person to talk about judicial issues, so long as you are not calling judges from the District of Columbia.

I am not going to say much about the history of the contempt power. I am sure you know, or will know soon, about that. I am not going to talk very much about the constitutional implications of the contempt power.

As a trial judge, I do have some concerns that I would like to raise with you this morning. The first point I would like to make is that it seems to me analytically there really is not that much that is unique, to the child custody context when one talks about contempt. Almost anything that can be said about limiting the contempt power, the power to incarcerate for contempt in a child custody case, could also be said about civil actions in general; that is, any cases in which courts are entering orders for the benefit of individuals.

Now, whether Congress decides as a matter of legislative policy to limit consideration to child custody cases is, of course, up to it. But analytically, I don't know that there are that many differences or distinctions to make.

The idea that a court should have contempt power, as Senator Hatch said, especially the power to incarcerate individuals who will not comply with court orders, or the power to threaten to do so, is absolutely critical. If a court lacks that power, individuals are in a position where they can bargain and barter with the court's orders for whatever terms they think ought to be applied, and the result is anarchy, not law.

My next point is that the civil contempt power really does work. With extremely rare exceptions, the threat or the actuality of incarceration does coerce people to comply with court orders.

In my experience in 4 years on the bench as a general jurisdiction judge, I have never had to actually jail anyone, because the mere threat, as we got to the point of incarceration, caused people to comply with my orders promptly and completely.

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[1] See p. 49 for Judge Messitte's prepared statement.

Now, getting to the main business at hand, which is Senate Bill 1163, there is nothing inherently objectionable about limiting incarceration for civil contempt, with this proviso: The limit cannot be so short that the prospect of early release compromises the coercive purpose of the incarceration. I don't think a cap should be less than a year; 18 months would not be unreasonable, nor perhaps, would 2 even 3 years. Again, that is a legislative call.

The more troublesome aspect of what happens when you place a cap for civil contempt is what happens to the contemnor, the person who is in contempt, after he is released from his confinement. Is he then forever free? Does the underlying order that he was defiant of remain unenforceable thereafter? Could he be ordered again to get in compliance with the underlying order and be found in contempt again if he fails to do that?

We, of course, have heard the discussion about the Morgan case, which I think is the occasion of this session. Let me modify the basic fact pattern, if I may, in order to neutralize the observations that I am going to make here. Let's assume for present purposes that a father has concealed a child from its mother based on his opinion that the mother has emotional problems, even though that matter has been heard by a trial judge and there has been no conclusion to that effect by the judge.

If the father were convicted of contempt, if he served the maximum 12 months that S. 1163 would impose, is he then free to withhold the child from the mother for the rest of the child's minority, or could he be reordered to produce this child after his release?

Now, I have listened happily, I might say, to Senator Hatch, who made it clear that he intended to preserve the criminal contempt process with his bill, and I am going to say more about that in a moment.

I have, however, looked at the language of S. 1163 and there is one part that I would like to call to the Subcommittee's attention. What it would say in its proposed subpart (b)—and I am going to leave out the irrelevant language—in essence is this: In any proceeding for custody of a minor child, no individual may be imprisoned for more than 12 months, pursuant to the contempt power described in subsection (a).

Subsection (a), in Section 11-944 of the District of Columbia Code applies to both civil and criminal contempt, so the problem you have got in S. 1163 is, if I were a judge reading this, I don't think you could imprison somebody for criminal contempt after you had had them in jail for 12 months for civil contempt. As I first read the bill, I thought that was the intention of the bill, to put an absolute 12-month cap for civil and/or criminal contempt as far as the case would be concerned. I think to the extent that there is a desire on the part of the sponsors of S. 1163 to make the criminal option available, you need to expressly clear that up in your statute. You need to say something to that effect, and I know that was the intent of the sponsor, but I think it needs to be clarified. To that extent, of course, House Bill 2136 addresses it more clearly and makes clear that the criminal option remains open.

I would like to make some distinctions that, Senator Hatch has made, and perhaps it will lead me to some other conclusions. Let

me distinguish for a moment between the civil and the criminal contempt process and why it is important.

In the civil contempt process, the judge alone will make the determination whether someone has failed to comply with his order, and if he finds that that is true, he would adjudge the person in civil contempt. He will put him in jail until he agrees to comply. And of course, as the common phase goes, the individual would have the keys to the jailhouse door in his pocket.

The criminal contempt proceeding, in contrast, could involve a jury trial, with the presentation of evidence, the right to counsel, and all the basic trappings of due process. A different judge would be involved. Sometimes it is very important to get somebody out of a situation where they are at loggerheads with a defiant individual. Of course, the standard of proof would be higher. You must prove criminal contempt beyond a reasonable doubt as opposed to by a preponderance of the evidence.

The inquiry—and this is important—in the criminal case is whether there has been past willful noncompliance with the court's order, and there the judge will impose a sentence for the past act.

Justice Douglas put it this way in *Penfield Company of California* v. *Securities Exchange Commission* in 1947. "Criminal contempt," he said, punishes "yesterday's contemptuous conduct," while the coercive sanction of civil contempt announces "the consequences of tomorrow's contumacious conduct."

In the District of Columbia, as in most States, a sentence for criminal contempt—we are talking about criminal contempt now—has no statutory limit. It may be any length of time that is not cruel and unusual. There was a case, *Matter of Neal,* in 1984, where the D.C. Court of Appeals upheld the trial judge's decision to incarcerate somebody for up to 48 months who would not answer questions before a grand jury. So that you see that if the criminal contempt power is preserved, it could mean piling on a substantial number of years after confinement for civil contempt.

Allowing for criminal contempt proceedings to follow, allowing for possible further incarceration, serves a very important purpose. It recognizes, in my view, consistent with a principle that has emerged in a number of cases, not quite at the Supreme Court level yet, but in some other cases, that there is a point that might be reached where the coercive effect of civil contempt comes to an end. A substantial likelihood may well arise that the contemnor will not comply with the underlying order that was the subject of the civil contempt order. And then, for a variety of reasons, one could fairly say that the civil contempt incarceration should come to an end. It may be because the rationale has ended, or because a further incarceration becomes impermissibly punitive, or even violative of due process.

But at the point that the individual's incarceration for coercive purposes ends, he is then exposed to further incarceration for his past willful noncompliance, for "yesterday's contemptuous conduct," as Justice Douglas would say.

So an individual may choose to defy the law, either as a matter of principle or even out of plain stubbornness, but there may be a price to pay for doing that. And the length of the sentence for the

criminal contempt could vary with the nature and circumstances of the underlying order.

Let us take the case at hand, or my reverse hypothetical as I have given it. If the underlying order has been to make a child available to a parent, arguably the withholding of the child is comparable to a kidnaping, which under the law of most States is a very serious felony, carrying a very long potential prison term. It is possible, and there is law to this effect, that someone could serve time for civil contempt, could then serve time for criminal contempt, and could still be prosecuted for the underlying crime on which the order was based; that is, in this particular hypothetical, for kidnaping. There is the prospect then of substantial punishment.

The final thought that I would like to offer is that limiting the duration of incarceration for civil contempt in a sense could have some negative consequences for the contemnor. I am not saying you should not do it, but I just think this is an observation worth making. If someone knows that there is a 1-year cap as opposed to a term of indefinite duration for their defiance of a court order, it is arguable that more individuals will opt to suffer the incarceration for civil contempt, and the resulting shorter jail terms could mean more frequent criminal prosecutions.

Now again, we have said this a number of times, so long as somebody in a civil contempt case is held indefinitely, he has the keys to the jailhouse door in his pocket. He can get out at any time. Once he is prosecuted for criminal contempt for his past willful noncompliance, however his subsequent decision to comply with the order will not automatically trigger his release. It is no longer a conditional sentence, it is an unconditional sentence.

And so he may have to serve his full time, and in the District of Columbia it could be 2, 3, 4, or 5 years for criminal contempt, as long as it is not cruel and unusual. The fact that he is now willing to comply with the court order may not make any difference with the judge. He is being punished for a past willful act.

Now, that may be a factor that a judge would take into consideration in perhaps reducing the sentence, but that is the key difference, the exposure may remain fixed.

Summing up, I would say that limiting jail time for civil contempt poses no problem in general and once the incarceration loses its potential coercive effect, then undoubtedly incarceration for that purpose should come to an end. However, sanctions for past noncompliance, including the possibility of future incarceration, must remain available. Of course, incarceration becomes punitive at that point, but that is an appropriate and necessary response in order to maintain respect for the law and the dignity of courts.

Let me close, if I may, with a passage from Justice Frankfurter, which I think expresses my position as well. This is from *United States* v. *United Mine Workers,* a decision that was rendered in 1947 by the Supreme Court: "In our country law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the

democratic process. For legal process is subject to democratic control by defined, orderly ways which themselves are part of law. In a democracy, power implies responsibility. The greater the power that defies the law, the less tolerant can this Court be of defiance. As the Nation's ultimate judicial tribunal, this Court, beyond any other organ of society, is the trustee of law and charged with the duty of securing obedience to it."

Mr. Chairman, all judges, State and Federal, at both the trial and appellate levels, are "trustees of law." We are all "charged with the duty of securing obedience to it."

I would be happy to entertain any questions at this time.

Senator SASSER. Well, thank you very much, Judge Messitte. You indicated in your statement that civil contempt, I think you said, really does work and that in your own experience you have never had to incarcerate an individual, that simply the mere threat of incarceration causes people to comply with your orders.

Given that scenario, do you not think that the threat of 12 months incarceration would be sufficient to compel compliance in 99.9 percent of all cases that would come before you dealing with child custody?

Judge MESSITTE. I think so, probably. I would not say that it is automatic that people would not comply after a year. There are cases where people have been held for 2, 3 and 4 years. Arguably, they could comply at some later point, but I think your assumption is correct.

Senator SASSER. Well, let me ask you this question, Do you think a person would be more likely to comply if they were facing an 18-month cap as opposed to a 12-month cap? I ask that question for this reason, it appears to me that if a person is that determined to defy the orders of the court—and you run into those rare individuals who are that determined, I suppose Elizabeth Morgan is one of those individuals—would it really make any difference to them whether you got a 12-month cap, an 18-month cap, or perhaps even a 3-year cap?

In your experience as a sitting jurist, could you render any kind of judgment on that question?

Judge MESSITTE. I suppose a year is long enough to know what somebody is going to do, but there may be some small group of people who will be influenced between the 12th and 18th month to change their mind and comply with the court order. That is a difficult one to say.

My concern is more that the cap not be too low. If it is too low, then it is clear that some people may go the distance and decide to ride out the civil contempt, and I think that is dangerous. Even though we talk about reserving the right to go forward with criminal contempt, it is a more difficult proceeding as far as the state is concerned. The flip side of the protections for the individual who is defiant, of the criminal rights that are observed, is that it is more difficult for the State to prosecute. Ultimately, then, it is more difficult for the State to vindicate respect for the court's orders.

Senator SASSER. Senator Glenn has asked me to propound three questions here to the expert witnesses, yourself, Judge Messitte, and our law professor. And I will begin with the first one.

For 15 months, a Baltimore woman, Jacqueline Bouknight, has been held in jail because she has refused to tell the State where her child is in order that the State can take custody of that child.

Now, Ms. Bouknight's child has been hospitalized twice in the past because of the mother's abuse, and now Baltimore social service workers fear that the child is either injured or dead.

If Bouknight reveals the child's whereabouts, she could face criminal charges for child abuse or murder. The question is, were a similar case to arise in the District of Columbia, would S. 1163 require that the parent suspected of child abuse or murder be released from jail without revealing where the child was or the child's condition?

Judge MESSITTE. Mr. Chairman, I am in a somewhat difficult position as a trial judge in Maryland saying anything relative to a case decided by the Maryland Court of Appeals. I understand that case is in the Supreme Court now and that certiorari has been granted. And I must in the end decline to answer on specific cases, and perhaps Professor Rendleman can respond more directly. I hope you understand. I may get a case something like that at some point and I don't know that I want to make that kind of determination.

Senator SASSER. Well, Judge Messitte, I certainly understand. I just hope Chairman Glenn does and will not hold you in contempt of Congress. [Laughter.]

Now, the second question, do you find it implausible that a parent in the District of Columbia, guilty of child abuse or murder, would choose to spend 12 months in jail for civil contempt rather than face criminal charges?

Judge MESSITTE. Do I understand why someone would do that?

Senator SASSER. Do you find it implausible.

Judge MESSITTE. I suppose someone could be motivated to do that. This is not without precedent. I mean, there are people who have defied court orders for a number of reasons. There were cases in the late 1950's, *Uphaus* v. *Wyman*, I remember, in which people who were members of suspect organizations were asked to disclose the names of people who were members. They declined to do so and they stayed in jail for a long time while that was pending. So there are people who will act out of what they believe to be principle, and that is okay. There may be a price to pay for it, as long as people understand what the result is.

Senator SASSER. Question number 3, Ralph S. Tyler, Assistant Maryland Attorney General, stated in a recent Washington Post article that, "The power to coerce uncooperative parents by jailing them is the most potent weapon available to juvenile court judges in trying to rescue battered youngsters."

The question is, how would S. 1163 affect that power, the power to coerce uncooperative parents?

Judge MESSITTE. Well, I think the power exists right now. Right now under D.C. law I suppose your civil power, commitment for civil contempt, is unlimited. And, of course, you always have the option of the criminal contempt to follow. The only way in which the bill would be affected is that it might well put the same kind of cap on incarceration for civil contempt.

I haven't read specifically what the extent of jurisdiction in child custody cases is in the District of Columbia and I don't know whether child custody extends to the specific example that you just gave, that is to uncooperative parents in child abuse cases. That may be a case which is not covered by the child custody language of this amendment and therefore you might still have the option of unlimited, indefinite incarceration for civil and then criminal contempt could follow. Beyond that, I cannot be sure.

Senator SASSER. The questions also ask, how would H.R. 2136 affect that power?

Judge MESSITTE. Well, I think it is essentially the same issue. That clearly covers all civil cases, so there is no question about extending H.R. 2136 to any kind of civil case, including the one you just mentioned. Of course, the cap could be 12 months extendible to 18 as long as a criminal prosecution went forward within, I think, the 6 to 12 months under H.R. 2136.

Senator SASSER. Thank you, Judge Messitte.

Senator Heinz.

Senator HEINZ. Judge Messitte, returning to the question I was asking Senator Hatch a moment ago, do you see much difference between the House and the Senate bills regarding the House's procedures for commencing a criminal trial as the sentence, in a sense, winds down—is wound down—in the House provisions?

Judge MESSITTE. I was rather intrigued by the House bill. I mean, what it really does is it says to the state, either prosecute this person for criminal contempt or forget it. In some ways it gets the issue addressed quickly.

Under S. 1163, it is possible someone could do their time for civil contempt and then could dawdle on for a long period of time before the criminal contempt were begun, whereas H.R. 2136 says, let's do it now, if at all. And it also provides that kind of transitional time in jail, if you will, that you were concerned about, the 12th to the 18th month where one can be held as long as the criminal trial has been begun and as long as it is terminated within the 18 months.

I felt that was a rather creative approach to the issue. Of course, I am not going to say beyond that whether or not I would vote for it, because that——

Senator HEINZ. Well, you are not going to have that chance, in any event——

Judge MESSITTE. That is right.

Senator HEINZ. Because you are not in that position.

Judge MESSITTE. Right, I found it intriguing though.

Senator HEINZ. Yes. Now there are two aspects to criminal proceedings, one of which you raised, that set them apart. One is that there is a higher burden of proof required of the state. In the case of criminal contempt, is it, as a practical matter, a far higher burden of proof? I would think that, as a nonlawyer, and you have probably guessed that already, that it might be somewhat easier to prove criminal contempt.

Judge MESSITTE. No, I think not. I think there is no question that it is a more difficult procedure from the state's standpoint, that you must——

Senator HEINZ. Could you elaborate on that?

Judge MESSITTE. Well, let's take the hypothetical case that we have dealt with and suppose that somebody is being prosecuted for criminal contempt for violating a court order that said deliver a child. To distinguish it, in the civil contempt case, someone might be brought in and the question was, did you comply with my order or didn't you, and you have an opportunity to be heard. I mean, let's not be misled about civil contempt hearings, there are hearings, evidence is taken, people have a chance to speak on their own behalf.

But the determination is then made by a judge based on just the greater probability that someone had the capacity to comply with an order and didn't do so. End of inquiry. If you didn't do it, then I am going to incarcerate you until you do it. And there are not 12 people out there to disagree.

Put it in the criminal context now for the past willful noncompliance. You have 12 people who have to agree on whether there was willful noncompliance. And the standard of proof, if you will, is no longer preponderance of the evidence, it is beyond a reasonable doubt. If you use the scales of justice, it isn't tipping slightly, as the judge has only to find in the civil case. It really has to tip emphatically that there was willful noncompliance with a court order.

And so you would get questions of, was the language of the order crystal clear? Exactly to what extent was there compliance or noncompliance with the order?

So there is no question that it is a more difficult proceeding for the state and, of course, the flip side, again, is that it provides greater protection for the defendant, which is fair, too.

Senator HEINZ. Now, you have made the point that criminal contempt is aimed at punishing past behavior whereas in civil contempt, "the key is in the pocket of the contemnor."

The way criminal contempt is utilized, though, would it be possible for a judge—once a finding of criminal contempt came from the jury—that the judge might impose a sentence but nonetheless allow the sentence to be reduced if the original court order was complied with?

Judge MESSITTE. Absolutely, and I suspect many judges would do that.

Senator HEINZ. So that that need not be looked at as a serious problem?

Judge MESSITTE. The answer is, of course that might happen, many judges might do it. Another observation to make though is that there may be some judges who are very angry, get quite exercised at the willful noncompliance with their order and the noncompliance may be of such a nature, so aggravated that a judge could impose substantial time and not be inclined to say, now that you have changed your mind and you are willing to comply with my order, I am going to reduce my sentence. An argument could be made in the context of this case that keeping a child from a parent during the irreplaceable years of infancy is a serious matter, and some judges may react rather strongly to that.

Senator HEINZ. But it would be a different judge——

Judge MESSITTE. That is important, that is true.

Senator HEINZ [continuing]. Is that not the case?

Judge MESSITTE. Yes, that is definitely the case.

Senator HEINZ. Now, my last question is this. At what point, if at all, where a contemnor is in jail, is there any opportunity for a further judgment that the incarceration is impermissibly punitive or is a violation of due process, or by the nature of things and the way the law is established in the District of Columbia, is there no place for that person to go?

Judge MESSITTE. In the District of Columbia today it hasn't been established as a matter of law that when confinement for civil contempt no longer has a coercive effect that it should come to an end. They haven't reached that decision. So I suppose someone could file a motion at any time—and I am sure it has been done in the Morgan case—to release the individual contemnor because coercion is no longer effective. It remains for—I think this issue is before the D.C. Court of Appeals now.

Senator HEINZ. Where might such a motion be filed?

Judge MESSITTE. Right in the court before the same judge who has imposed the incarceration for civil contempt.

Senator HEINZ. And if that judge said no, is there any appeal from that judge?

Judge MESSITTE. Well, I assume there is an appeal, and the question is how expansive that would be. The appellate court would probably examine it from the standpoint of whether the trial judge had abused his discretion. That is the standard that is generally used in cases like this on appeal, but I must say that in my experience, having read appellate cases, appeals courts are very scrupulous about contempt cases and they look very carefully to see whether there has been an abuse of discretion, and there are probably more reversals in this area by appeals courts than in most areas.

Senator HEINZ. So there is ample legal precedent, do I understand it, that a contemnor may file a motion that goes to a higher court for review and higher courts will, on occasion—frequently, infrequently, and I would like you to fill in that word—judge that there was an impermissibly punitive result or a violation of due process?

Judge MESSITTE. Well, I am not absolutely sure in the District of Columbia, but as I understand it——

Senator HEINZ. No, I am not talking about the District of Columbia.

Judge MESSITTE. Well, generally there is review of contempt orders. They are usually done on an expedited basis, in fact, and the court will then determine whether or not there has been an abuse of discretion. What this case in particular, I think, the Morgan case, gives the District of Columbia Court of Appeals an occasion to do is to decide to adopt the principle, if it cares to, that when confinement for civil contempt is no longer effective and becomes punitive that it must come to an end and the next option would be criminal contempt. That is what the court, I think, can decide, if I understand the appeal correctly.

Senator HEINZ. Thank you very much.

Judge MESSITTE. Mr. Chairman, may I submit a copy of my statement for the record?

Senator SASSER. Yes, indeed, and it will be included in the record completely.

Judge Messitte, thank you very much for appearing this morning and testifying and giving us the benefit of your views. It has been very helpful. It is a pleasure to have you before the Subcommittee and a pleasure to see you again.

Judge MESSITTE. Thank you very much, Mr. Chairman.

Senator SASSER. Our next witness if Professor Doug Rendleman. Professor Rendleman is on the faculty of Washington and Lee Law School. He is an expert in the field of civil contempt and is the author of a legal case book, which I must confess, Professor Rendleman, I have not read.

But we are delighted to have you with us this morning and look forward to your testimony.

TESTIMONY OF PROFESSOR DOUG RENDLEMAN, WASHINGTON AND LEE LAW SCHOOL [1]

Mr. RENDLEMAN. Well, thank you, Mr. Sasser.

Mr. Sasser contributed an article to the Washington and Lee Law Review, and I take this occasion to thank him for that.

Senator SASSER. Thank you.

Mr. RENDLEMAN. Thanks to the Chairman and to the members of the Committee for having these hearings, and thanks for inviting me to be here. I have, of course, put in a prepared statement that has a lot of very technical background. I have been attempting to take notes while this was going on, and I will try to direct most of my remarks to the issues that seem to be in contention, the important points.

By way of background, first of all, an injunction is a crucial tool for effective government, particularly today, to protect constitutional rights. Injunctions are used by judges to protect many interests under Federal law—copyright, trademark, the interest in being free from employment discrimination.

Judges use contempt to enforce injunctions, and a point that all of our people have made, while necessary, contempt is subject to abuse. There is no jury, the burden of proof is lower than criminal procedure. And steps to curb contempt are necessary, in order but, because trial judges need contempt, hard to work out.

It is very difficult to accommodate individual liberties and effective government, and that is what we are trying to undertake, and that is the hard job of this Committee.

Now, first of all, the Elizabeth Morgan case is not the problem, but it is the lightning that revealed the problem. And I got involved in this last summer. I thought 1 year was enough, and I wrote an article about it, and I would like to join Senator Hatch in urging the Committee to proceed quickly for Dr. Morgan and to pass something that clearly applies to her.

That having been said, I think the idea of a legislative cap is appropriate. I address, on page 3 of my statement, the idea that we have a judicial doctrine to release uncoercible contemnors, but in some cases it does not work, and as a general matter, there are probably some points that can be made on behalf of a legislative cap.

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[1] See p. 57 for Mr. Rendleman's prepared statement.

Congress itself, in dealing with the principal area of civil contempt in the Federal courts, has capped coercive contempt confinement. And the reasons for that are the judges have trouble drawing specific lines—saying age 21 is the age of majority, the tax should be 12 percent—and this involves a specific line, the kind of decision that is appropriate for legislative decisionmaking.

The rules that the courts have developed are imprecise and they cause problems for lawyers in presenting evidence, preparing cases, and judges for deciding them. The judges are left at large in how to apply these rules.

Probably the basic reason for a legislative cap is that the judicial doctrines simply commit too much unchecked power to a single, fallible trial judge. Nothing guarantees that an individual judge will be convinced in a case. And we are back where we were in the 17th century saying that the Court of Equity depends on the length of the Chancellor's foot. You get one decision from one judge, another decision from another judge, and the legislature can help. I think that the Senate bill is better, the cumulative cap for civil contempt.

I will next address the question of whether the legislation would be better if it addressed child custody only. I think the problems are most acute in child custody. But I think the 20 years' experience with Federal section 1826, the Federal Recalcitrant Witness Statute, is satisfactory to say that this kind of cap can be applied generally on the coercive contempt imprisonment.

One of the principal kinds of cases that frequently gets publicity in the press, of course, are reporters claiming source privileges being imprisoned to tell who the source is. And Mr. Fahr, in Los Angeles, in the Manson case, and Mr. Farber for the New York Times about, I guess, I think it was "Dr. X" in New Jersey, I tried to remember it while I was listening.

Child custody is, obviously, the most acute and very much warranted. I think it would be better if the legislation were to address civil contempt confinement generally.

Now, the next question is the question that both Senator Hatch and Judge Messitte addressed, and that is the civil/criminal transition. Now, we can certainly put a case where it is necessary to have criminal follow civil contempt. For example, a witness given immunity to testify at a trial, to supply important testimony at the trial, refuses to testify at the trial and the judge orders him or her imprisoned for coercive contempt until the end of the trial. When the trial is over, the defendant is acquitted and the witness has welched on the deal, but nevertheless there is no reason to sustain the civil contempt, because the need for the testimony is gone.

At that point, some triggering of criminal contempt power is necessary and in order. I worked with the House bill during the short time that it has been available to me this week and I think it is cumbersome and complex. Senator Hatch's approach is probably better; that is, to leave it to the judges, and this has certainly been done.

The Senate bill as it is written probably does, as the judge says, cap criminal as well. And so, that part of it might need to be corrected to allow the transition from civil to criminal.

Now, the question of the appeal is raised here. I prefer that the Congress consider the approach taken in Federal section 1826, which tells the appellate court to decide a case within 30 days, rather than the approach that is in the proposed legislation that says it must hear the appeal within 60 days. The way I understand it is the 60 days would mean that the appellate court must take the case under oral submission and might necessarily have an unlimited time to decide it. I think the Federal section 1826(b) is better in telling the appellate court to decide it. Someone who is being unnecessarily imprisoned, if possible, has a right to a quick decision.

I think that the questions that Senator Glenn mentions grow out of the privilege against self-incrimination. And I feel the same way as the Judge does about a pending case. But the way it frequently works before a grand jury is that a witness is called in before the grand jury, perhaps a witness that is involved in organized crime and is asked a question and declines to answer the question, claiming the privilege against self-incrimination.

At that point the authorities have the choice to grant that witness immunity from prosecution. And if the authorities grant the witness immunity, then the witness can be forced to answer or held in contempt.

Now, the authorities then can grant the witness immunity and get the evidence, or hold the witness in contempt. Alternatively, they can prosecute the witness for a crime. And as nearly as I can figure out from what I have read in the Post—and the Post does get out to Lexington—and from the United States Law Week report of the particular case, the authorities are not ready to prosecute this person criminally and deal with the self-incrimination privilege that will almost inevitably be interposed.

Now, I have attempted to address the issues as they were raised and to shorten my remarks pretty clearly in the interest of leaving time for questions. But let me see whether I have covered my points——

Senator SASSER. Well, let me say this, Professor Rendleman, your statement will be included in the record in its entirety.

Mr. RENDLEMAN. Okay, thank you. Well, let me say I appreciate the opportunity to be here. I think it is important to accommodate individual liberties and the taxpayers' use of their tax money with effective government. I think the statutory cap is appropriate. I think it would be better if it were not limited to child custody. I think it is quite appropriate to limit it in child custody cases.

The choice of 18 months came up, and I just read an article yesterday afternoon in the University of New South Wales Law Journal about child custody contempt and they suggested 2 years. I think my judgment is—I guess I have already said it—2 years is too long, 18 months, Congress' choice for people involved in organized crime, may very well be too long. Professor Martineau in addressing the problems in Wisconsin said that the 6-month limit has not stopped western civilization in Wisconsin. I think that 6, 12, 18 months, 12 months is a quite satisfactory period of time.

I would hope in aid of that cap that expedited appeals be required, that courts be required to decide the appeals.

I appreciate the invitation to present the statement, to be with you, and I thank you for your patience, and I wonder whether there are some questions.

Senator SASSER. Yes, Professor Rendleman, can you tell us what the experience has been in other jurisdictions where there is a cap on civil contempt?

Now, you mentioned Wisconsin. Does Wisconsin have a 6-month cap?

Mr. RENDLEMAN. Yes.

Senator SASSER. And does California have a 12-month cap?

Mr. RENDLEMAN. Yes.

Senator SASSER. Do you know what the experience has been in those jurisdictions?

Mr. RENDLEMAN. I don't think any empirical study has been done. I think the Judge's point, which is that coercion works, is correct, generally, short periods or the threat to confine. The instances of people being held for beyond a week or a month are so rare that we really don't have any good study of it.

Somebody who is a law professor will only get the appealed cases, reported cases. I think there is a child custody case going on in Washington right now that is—Washington State—that is the Morgan case sex-reversed with the father in jail.

But we really don't know that much about the experience. Bob Martineau said that the judges in Wisconsin wanted the statute in the first place and like it, that it has not caused any problem. I hope that you all can address Professor Martineau about that.

Senator SASSER. The judges themselves in Wisconsin wanted this 6-month cap?

Mr. RENDLEMAN. I am not sure that that precise statement is correct. They wanted the statute, and Bob worked with a—he was a judicial administrator and worked with a group of judges in drafting it.

My view would be that something like this would never pass over organized opposition from the judiciary.

Senator SASSER. Now, you are concerned, and I am concerned, that the Senate bill does cap criminal contempt as well as civil contempt.

Mr. RENDLEMAN. It may very well, as it is written.

Senator SASSER. Right, and I believe Judge Messitte expressed that same concern, if I am not mistaken, is that correct?

Judge Messitte, for the record, is nodding his head in the affirmative.

Professor Rendleman, let me propound to you the questions of Chairman Glenn here and get your response, if I may.

For 15 months a Baltimore woman, Jacqueline Bouknight, has been held in jail because she has refused to tell the State where her child is so the State can take custody. Her child has been hospitalized twice in the past because of his mother's abuse. Baltimore social service workers fear the child is injured or dead. If Bouknight reveals the child's whereabouts she will face criminal charges—or she could face criminal charges—for child abuse or murder.

The question is, were a similar case to arise in the District of Columbia, would S. 1163 require that the parent suspected of child

abuse or murder be released from jail without ever revealing where the child was or the child's condition?

Mr. RENDLEMAN. Well, first of all, we don't know whether it would apply—whether a targeted bill like the Senate bill, Senator Hatch's bill—would apply to this kind of case at all.

Senator SASSER. Well, how about a broader bill, the House bill, H.R. 2136, how would it affect such a parent?

Mr. RENDLEMAN. Secondly, I think that it would cap the attempt to obtain the testimony at 18 months. At that point my view is that the Government ought to try another route, ought to grant immunity from criminal prosecution and find out where the child is, or something.

Senator SASSER. What if they granted immunity and she confessed that she had murdered the child?

Mr. RENDLEMAN. The iniustice is caused by the privilege against self-incrimination, and it is a price that we have said we are willing to pay for privacy.

Senator SASSER. Do you find it implausible that a parent in the District of Columbia guilty of child abuse or murder would choose to spend 12 months in jail for civil contempt rather than face criminal charges?

Mr. RENDLEMAN. I find a lot of these cases implausible. I think that we are not dealing with Joe and Jane Average, and the kinds of people that are frequently involved in contempt that reaches this stage are rugged, dogged, not average people.

Is that responsive, Senator Sasser?

Senator SASSER. Well, I'll let Chairman Glenn make the judgment on that, Professor Rendleman.

Now, the third question is, Ralph Tyler, the Assistant Maryland Attorney General, stated in a recent Washington Post article that, "The power to coerce uncooperative parents by jailing them is the most potent weapon available to juvenile court judges in trying to rescue battered youngsters."

How would S. 1163 affect that power, and how would H.R. 2136 affect that power to rescue these battered youngsters?

Mr. RENDLEMAN. Well, first of all the Senate bill may not apply to it at all. Secondly, the House bill would cap the civil coercive confinement at 12 months, and I would think that is time for the Government to be pursuing other ways of solving that problem.

We have to ask ourselves whether at that point the incarceration, the confinement, is criminal and the authorities are simply using civil process to punish somebody for a crime.

More training for judges, more social work people. I think the contempt power is really too blunt and awful to be very useful in these kinds of cases. More social services seem to me to be much more responsive to solving the problems.

Senator SASSER. Well, Professor Rendleman, we are grateful to you for appearing here today and giving us the benefit of your views. And there could be additional questions for the record that we would like to send to you, and if they are forthcoming, we would ask you to respond in a timely fashion.

We are anxious to mark up this bill, as I indicated to Senator Hatch earlier, and get it to the Floor in time for both Senate action

and the action of the House/Senate Conference Committee before we adjourn.

This hearing is closed.

[Whereupon, at 11:30 a.m., the Subcommittee adjourned subject to the call of the Chair.]

APPENDIX

101ST CONGRESS
1ST SESSION

S. 1163

To amend the District of Columbia Code to limit the length of time for which an individual may be incarcerated for civil contempt in a child custody case in the Superior Court of the District of Columbia and to provide for expedited appeal procedures to the District of Columbia Court of Appeals for individuals found in civil contempt in such a case.

IN THE SENATE OF THE UNITED STATES

JUNE 13 (legislative day, JANUARY 3), 1989

Mr. HATCH introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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A BILL

To amend the District of Columbia Code to limit the length of time for which an individual may be incarcerated for civil contempt in a child custody case in the Superior Court of the District of Columbia and to provide for expedited appeal procedures to the District of Columbia Court of Appeals for individuals found in civil contempt in such a case.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. LIMITATION ON TERM OF INCARCERATION IMPOSED FOR CONTEMPT IN CHILD CUSTODY CASES.

(a) SUPERIOR COURT.—Section 11–944 of the District of Columbia Code is amended—

(1) by striking "In addition" and inserting "(a) Subject to the limitation described in subsection (b), and in addition"; and

(2) by adding at the end the following new subsection:

"(b) In any proceeding for custody of a minor child conducted in the Family Division of the Superior Court under section 11–1101(1), no individual may be imprisoned for more than 12 months pursuant to the contempt power described in subsection (a) for disobediance of an order or for contempt committed in the presence of the court.".

(b) DISTRICT OF COLUMBIA COURT OF APPEALS.—Section 11–741 of the District of Columbia Code is amended—

(1) by striking "In addition" and inserting "(a) Subject to the limitation described in subsection (b), and in addition"; and

(2) by adding at the end the following new subsection:

"(b) In the hearing of an appeal from an order of the Superior Court of the District of Columbia regarding the cus-

tody of a minor child, no individual may be imprisoned for more than 12 months for disobediance of an order or for contempt committed in the presence of the court pursuant to the contempt power described in subsection (a).".

SEC. 2. EXPEDITED APPEALS PROCESS FOR INDIVIDUALS INCARCERATED FOR CONTEMPT IN CHILD CUSTODY CASES.

Section 11–721 of the District of Columbia Code is amended by adding at the end the following new subsection:

"(f) The District of Columbia Court of Appeals shall hear an appeal from an order of the Superior Court of the District of Columbia holding an individual in contempt and imposing the sanction of imprisonment on such individual in the course of a case for custody of a minor child not later than 60 days after such individual requests that an appeal be taken from that order.".

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall apply with respect to individuals imprisoned for disobediance of an order or for contempt committed in the presence of the Superior Court of the District of Columbia or the District of Columbia Court of Appeals in the course of a case for custody of a minor child on or after January 1, 1987.

II

101ST CONGRESS
1ST SESSION

H. R. 2136

IN THE SENATE OF THE UNITED STATES

JULY 11 (legislative day, JANUARY 3), 1989
Received; read twice and referred to the Committee on Governmental Affairs

AN ACT

To amend the District of Columbia Code to limit the length of time for which an individual may be incarcerated for civil contempt in the courts of the District of Columbia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "District of Columbia Civil Contempt Imprisonment Limitation Act of 1989".

SEC. 2. LIMITATION ON TERM OF INCARCERATION IMPOSED FOR CIVIL CONTEMPT.

(a) SUPERIOR COURT OF THE DISTRICT OF COLUMBIA.—Section 11–944 of the District of Columbia Code is amended—

(1) by striking "In addition" and inserting "(a) In addition"; and

(2) by adding at the end the following new subsections:

"(b)(1) Except as provided in paragraph (2), no individual may be imprisoned for more than 12 consecutive months for civil contempt pursuant to the contempt power described in subsection (a) for disobedience of an order or for contempt committed in the presence of the court.

"(2) Notwithstanding the provisions of paragraph (1), an individual who is charged with criminal contempt pursuant to subsection (c) may be imprisoned until the completion of such individual's trial for criminal contempt, except that in no case may such an individual be imprisoned for more than 18 consecutive months for civil contempt pursuant to the contempt power described in subsection (a).

"(c)(1) An individual imprisoned for 6 consecutive months for civil contempt for disobedience of an order pursuant to subsection (a) who continues to disobey such order may be prosecuted for criminal contempt for disobedience of such order at any time before the expiration of the 12-month period that begins on the first day of such individual's imprisonment, except that an individual so imprisoned as of the date of the enactment of this subsection may be prosecuted

under this subsection at any time during the 90-day period that begins on the date of the enactment of this subsection.

"(2) The trial of an individual prosecuted for criminal contempt pursuant to this subsection—

"(A) shall begin not later than 90 days after the date on which such individual is charged with criminal contempt;

"(B) shall, upon the request of the individual, be a trial by jury; and

"(C) may not be conducted before the judge who imprisoned the individual for disobedience of an order pursuant to subsection (a).".

(b) DISTRICT OF COLUMBIA COURT OF APPEALS.—Section 11–741 of the District of Columbia Code is amended—

(1) by striking "In addition" and inserting "(a) In addition"; and

(2) by adding at the end the following new subsections:

"(b)(1) Except as provided in paragraph (2), no individual may be imprisoned for more than 12 consecutive months for civil contempt pursuant to the contempt power described in subsection (a) for disobedience of an order or for contempt committed in the presence of the court.

"(2) Notwithstanding the provisions of paragraph (1), an individual who is charged with criminal contempt pursuant to subsection (c) may be imprisoned until the completion of such individual's trial for criminal contempt, except that in no case may such an individual be imprisoned for more than 18 consecutive months for civil contempt pursuant to the contempt power described in subsection (a).

"(c)(1) An individual imprisoned for 6 consecutive months for civil contempt for disobedience of an order pursuant to subsection (a) who continues to disobey such order may be prosecuted for criminal contempt for disobedience of such order at any time before the expiration of the 12-month period that begins on the first day of such individual's imprisonment, except that an individual so imprisoned as of the date of the enactment of this subsection may be prosecuted under this subsection at any time during the 90-day period that begins on the date of the enactment of this subsection.

"(2) The trial of an individual prosecuted for criminal contempt pursuant to this subsection—

"(A) shall begin not later than 90 days after the date on which such individual is charged with criminal contempt;

"(B) shall, upon the request of the individual, be a trial by jury; and

"(C) may not be conducted before the judge who imprisoned the individual for disobedience of an order pursuant to subsection (a).".

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall take effect on the date of the enactment of this Act.

Passed the House of Representatives June 28, 1989.

Attest: DONNALD K. ANDERSON,

Clerk.

Statement in Support of S. 1163,
Limiting Incarceration for Civil Contempt
in District of Columbia Child Custody Cases
Senator Orrin G. Hatch
July 21, 1989

Thank you, Mr. Chairman. Last month I introduced S. 1163, a bill which would amend the District of Columbia Code to limit to one year the length of time for which an individual may be incarcerated for contempt of court in a child custody case in the Superior Court of the District of Columbia. Currently there is no statutory limit.

The contempt power is a significant tool for judges seeking to enforce their orders. Many commentators, and some courts, have noted that it is uniquely dangerous, since in civil contempt proceedings a judge has almost unfettered discretion. See, e.g., Martineau, "Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt," 50 U. Cin. L. Rev. 677 (1981).

Proceedings for criminal contempt include virtually all the protections extended to other criminal defendants: the contempt must be proven beyond a reasonable doubt; the defendant cannot be required to incriminate himself; double

jeopardy is prohibited; the offense is pardonable; the accused is presumed innocent; and so on. Note, "Modern Discussion of a Venerable Power: Civil Versus Criminal Contempt and its Role in Child Support Enforcement: Hicks v. Feiock," 22 Creighton L. Rev. 163, 170-71 (1988). Proceedings for civil contempt, however, lack many of these protections; the standard of proof is lower, for example, and the contemnor has no right to a jury trial. Id. at 171.

Clearly, the courts need sufficient independent authority to conduct their business and enforce their judgments, including the power to punish for contempt. But the broad civil contempt power must be exercised with prudence and self-restraint. Like any other power exercised by a government official, it can be abused. Any abuse of the civil contempt power is a very serious matter, for a civil contemnor may be subject to virtually unlimited fines and indefinite incarceration. Furthermore, the contempt hearing will be conducted by the very judge whose authority the contemnor challenges.

It is said that the contemnor has the jailhouse keys in his or her own hands. In re Nevitt, 117 F. 448, 461 (8th Cir. 1902), cited in In Re Grand Jury Investigation, 600 F.2d 420, 422-23 (3d Cir. 1979). In other words, the contemnor will be freed as soon as he or she complies with the court's

order. However, in one poignant context this truism rings hollow. In a child custody dispute where one parent refuses to produce the child for the other pursuant to a court visitation or custody order, and the court invokes its civil contempt power to incarcerate the recalcitrant parent, the child is deprived of the nurturing, care, and love of both parents.

The Morgan Case

There are several examples of this. One of the most publicized examples involves Dr. Elizabeth Morgan. On August 21, 1987, D.C. Superior Court Judge Herbert B. Dixon, Jr., ordered Morgan to deliver her daughter Hilary to her ex-husband, Dr. Eric Foretich, for a two-week unsupervised visit. Morgan refused, claiming that Foretich had sexually abused Hilary during past visits. During a partly closed hearing on August 26, 1987, Judge Dixon held Morgan in contempt of court for defying the order and imposed a fine of $5,000 for each day she refused to comply. On August 28, 1987, Dr. Morgan began serving an indefinite jail sentence for contempt. She has now spent nearly two years in jail and has resolutely asserted that she will stay until Hilary is 18 (another 12 years), rather than allow Dr. Foretich access to her. Judge Dixon appears willing to keep Morgan imprisoned until she relents. Hers is a Hobson's choice: either

surrender her daughter to someone she believes sexually abused the child or stay in jail indefinitely.

The purpose of civil contempt is not to punish but to coerce compliance with the court's order. Once it is clear that the civil contempt sanction will not coerce a recalcitrant individual, that sanction must be removed. The failure to do so constitutes a deprivation of liberty or property without due process. That is, the coercive sanction is transmuted into a punitive sanction at the point coercion can no longer fairly be said to be possible and, therefore, the contemnor is entitled to further procedural protections before the sanction can continue. See, e.g., Shillitani v. United States, 384 U.S. 364, 371-72 (1966); In re Grand Jury Investigation, 600 F.2d 420, 423-24 (3d Cir. 1979); Lambert v. Montana, 545 F.2d 87, 89-90 (9th Cir. 1976); Matter of Thornton, 560 F. Supp. 183, 184 (1983).

Dr. Morgan has served longer than many convicted criminals, even though she endangers no one. Each prisoner costs taxpayers tens of thousands of dollars a year. In a jurisdiction perpetually releasing those apprehended on drug busts and sweeps because the jails lack room for them, scarce jail space could be better used. Dr. Morgan's medical practice has disappeared, along with her home and other assets, and she is now the longest-residing female prisoner

at the D.C. Detention Center. She has nothing left to lose. She insists that she will never comply with the court order, an assertion to which her adamance thus far lends credence. There is no indication that continued imprisonment will change her mind. She appears immune to the coercive authority of the court.

After Dr. Morgan had been incarcerated for 6 months, Judge Dixon said, "The coercion has only just begun." (Washington Post, December 16, 1988.) Had she been imprisoned for criminal contempt in federal court, her initial sentence would have been for a definite period, and a jury trial would have been required to incarcerate her for more than six months. See Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966). Now, however, she is still serving indefinitely. No one in the District of Columbia has ever served as long on a civil contempt charge. During this whole time Hilary has been without benefit of either parent. Surely this result cannot be in the best interests of the child.

On Friday, June 9, 1989, Dr. Morgan's brother, Robert M. Morgan, appeared before Judge Dixon pursuant to subpoena. Mr. Morgan, an Assistant U.S. Attorney in the District of Columbia, refused 26 times to comply with the Judge's orders to disclose Hilary's whereabouts, according to the June 10,

1989, Washington Post. Judge Dixon took no action against Mr. Morgan but directed him to report any change of address or employment and noted he could be jailed for contempt. Id. The specter is now raised of the court incarcerating Dr. Morgan's brother for civil contempt as a means of increasing the pressure on Dr. Morgan herself. If this happens, I suppose the judge could feel free to jail Dr. Morgan's relatives seriatim over the next 12 years before determining she will not be coerced. Enough is enough.

I am not taking sides in the Morgan-Foretich dispute. However, a brief comment on Morgan's stated reason for defying the court order may help illustrate the importance of this bill. When Dr. Morgan became concerned about possible sexual abuse, she took Hilary to several different examiners. Some of these failed to diagnose sexual abuse, but a very highly qualified specialist -- Charles I. Shubin, M.D., a board certified pediatrician, Associate Professor of Pediatrics at the University of Maryland, and cofounder and codirector of the first program in the United States for the training of pediatric health professionals in the diagnosis of child sexual injuries -- found serious vaginal scarring and other injury indicative of abuse. Psychologist Mary Froning of the Chesapeake Institute in Chesapeake, Maryland, saw Hilary for 87 sessions from January 1986 to August 1987. Her notes document that in 21 of those visits Hilary

described physical or sexual abuse. Froning explained that Hilary could not have fabricated the incidents or been coached to recite them because of the explicit detail and authentic emotional state with which she recounted them. (Washingtonian, December 1988.)

In a related case, according to the U.S. Court of Appeals for the Fourth Circuit, Dr. Shubin was prepared to testify that Heather, Foretich's daughter by his second wife (Morgan was his third), exhibited injuries similar to those suffered by Hilary. "[N]umerous other professionals and lay witnesses [were also] prepared to testify that Heather had been sexually abused during visitation periods with [Foretich and his parents]." Morgan v. Foretich, 846 F.2d 941, 943-44 (4th Cir. 1988). Evidence of Heather's injuries was excluded from both the D.C. and federal court cases. The Fourth Circuit ruled that the evidence in the federal case was excluded inappropriately. "The proferred evidence of sexual abuse suffered by Heather ... was highly relevant," it said. In fact, "this evidence was essential in that it tended to identify the defendants [Foretich and his parents] as the perpetrators of the crime against Hilary since only the defendants had access to both girls. No other piece of evidence could have had a comparable probative impact as to the identity of Hilary's assailants. This evidence also

negated several defenses raised by the defendants."' Morgan v. Foretich, 846 F.2d 941, 944 (4th Cir. 1988).

Foretich denies ever molesting Hilary. Judge Dixon found the evidence of sexual abuse "in equipoise" -- in other words, equally balanced. (Legal Times, December 5, 1988; New York Times, December 15, 1988.) Neither party won suits accusing the other of abuse; the courts cannot determine which party is telling the truth. Under such circumstances, a mother's protectiveness should not be punished forever. My bill makes the 12-month cap on civil contempt in such cases retroactive to January 1, 1987, and thus would free Dr. Morgan.

Elizabeth Morgan is only one of several mothers recently imprisoned under the contempt power for refusing to send their children to court-ordered visitations with ex-husbands accused of sexual abuse. Note, "Modern Discussion of a Venerable Power: Civil Versus Criminal Contempt and its Role in Child Support Enforcement: Hicks v. Feiock," 22 Creighton L. Rev. 163, 183 n.195 (1988). These cases have prompted reevaluation of the rules surrounding incarceration for contempt. Civil contempt is supposed to be coercive, not punitive; to entice the contemnor to obey the court, not to punish him or her for refusing to do so. Regardless of the merits of the Morgan case -- the facts of which are detailed,

complex, and partly secret -- the present District of Columbia law regarding civil contempt does not take into account unique concerns arising in child custody cases.

The 12-month Cap

Under Rule 42 of the Federal Rules of Criminal Procedure, a criminal contempt may be punished summarily, but it must be prosecuted on notice, with a hearing, and the defendant is entitled to a trial by jury. If the contempt involves disrespect to or criticism of a judge, that judge is disqualified unless the defendant consents. Moreover, if found guilty, the defendant still receives a fixed punishment. Fed. R. Crim. P. 42.

Such protections are lacking for most civil contemnors. The federal recalcitrant witness statute provides that an uncooperative witness before a court or grand jury may be confined until he or she is willing to provide the requested information. The confinement is capped at 18 months. 28 U.S.C.A. 1826. For ordinary civil contempt, however, there is no cap either in the federal courts or in those of 48 states. The exceptions are California, with a 12-month limit, and Wisconsin, with a 6-month limit. (For a detailed discussion of the Wisconsin law, see Martineau, "Contempt of

Court: Eliminating the Confusion Between Civil and Criminal Contempt," 50 U. Cin. L. Rev. 677 (1981).

Moreover, if the contemnor has nothing left to lose, or demonstrates an unwillingness ever to be persuaded by the court's action, the imprisonment serves no remedial or potentially coercive purpose. Continued imprisonment under such circumstances is then punitive and is constitutionally impermissible as a deprivation of liberty without due process. See, e.g., Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442-52 (1911); Jackson v. Indiana, 406 U.S. 715, 738 (1972).

S. 1163 simply recognizes that after a year continued imprisonment is unlikely to coerce a contemnor in a child custody case to comply with the court order. This is an appropriate exercise of Congressional power. Under the Home Rule Act, only Congress can determine the jurisdiction of D.C. courts. The D.C. Council is not empowered to consider this matter itself.

H.R. 2136, a related bill, has passed the House of Representatives by an overwhelming margin, with the cosponsorship of District of Columbia Delegate Walter Fauntroy and others.

How does H.R. 2136 differ from S. 1163?

H.R. 2136 differs from S. 1163 in three significant respects. First, the House bill is not limited to child custody cases; it applies to all cases of civil contempt. I acknowledge that the potential for abuse of the civil contempt power exists in all civil litigation, not only in child custody cases. If present law regarding civil contempt arguably permits infringements on individual liberty violative of the Due Process Clause, these are as serious in other civil cases as they are in the child custody context.

I continue, however, to prefer S. 1163. It addresses the child custody problem without unduly circumscribing the judge's authority. It preserves discretion for D.C. judges to address widely disparate civil contemnors. In some cases the judge needs unfettered summary contempt power -- to crack the code of silence in civil cases involving organized crime figures, for example. S. 1163 avoids sweeping changes in contexts where abuses have not been demonstrated. On the record before Congress, remedial legislation should address only the civil contempt power in child custody cases.

The second significant distinction between H.R. 2136 and S. 1163 is that under the House bill, continued disobedience of an order after six consecutive months of imprisonment for

civil contempt may be prosecuted as criminal contempt. The prosecution must occur within 12 months of the date of incarceration. An exception is made for individuals so imprisoned as of the date of enactment (i.e., Dr. Morgan), who may be prosecuted within 90 days of the date of enactment.

Again, this approach has some desirable aspects to it. However, nothing prevents prosecution for criminal contempt now. It may be desirable to spell out the procedure specifically, as the House bill does, but the provision is not really necessary. I prefer the approach of S. 1163. The flat one-year cap has the important advantages of simplicity and clearness.

The third difference is that H.R. 2136 permits continued incarceration of an individual charged with criminal contempt as described earlier while the criminal contempt trial proceeds, but in no case for longer than 18 months under the civil contempt power. Again, this is a reasonable proposal, but I continue to prefer the straight 12-month cap. One year is long enough.

I stress that my greatest concern about H.R. 2136 is that it applies to all cases, not only child custody matters. Since no abuses have been demonstrated outside the

child custody context, it makes little sense to limit the judge's summary contempt authority there.

As I mentioned earlier, my bill would apply to child custody cases in the District of Columbia only. This limited application has the advantages of disrupting little settled law and of preserving discretion for D.C. judges to address widely disparate civil contemnors in other kinds of cases. The limited changes applicable to child custody cases would affect basically honest people with honest disagreements. The child is the real loser in such cases, deprived indefinitely of both parents. The case for limiting the court's summary contempt power is strongest here.

Under present federal law, imprisonment for criminal contempt may not continue for more than six months without a jury trial. Seen in that light, a 12-month cap on imprisonment for civil contempt in the context of child custody proceedings does not unduly restrict the power of the courts to regulate their own affairs; but it does afford an important protection to litigants in these cases -- and to their children.

Conclusion

14

Traditional burdens of proof are exceptionally difficult to meet in cases of child sexual abuse, especially with respect to very young children. The evidence of abuse may be sufficient to convince a well-trained physician or therapist but insufficient to convince a court. In such a case, when the parent of the abused child refuses to submit to court-ordered demands to allow the alleged abuser access to the child, many courts are sentencing the recalcitrant parent, which is typically the mother, to contempt. Some mothers have gone underground rather than submit to the court, and taken the child with them. Others have gone to prison rather than risk endangering their children.

A one-year limit on imprisonment for civil contempt in child custody cases before the D.C. Superior Court is a prudent and needed step to protect the interests of the children in these deeply unfortunate cases.

Thank you, Mr. Chairman.

STATEMENT OF JUDGE PETER J. MESSITTE

Before the U.S. Senate Subcommittee
on General Services, Federalism, and the District
of Columbia, relative to S.1163 --
D.C. Civil Contempt Imprisonment Bill

July 21, 1989

My name is Peter J. Messitte. I am an Associate Judge for the Sixth Judicial Circuit of Maryland, which covers Montgomery and Frederick Counties. I sit in Rockville and hear cases of both a civil and criminal nature.

The Subcommittee has asked for my views relative to S.1163. I am happy to respond.

Much of the history, including the constitutional significance, of the contempt power, I am sure has been brought to your attention already or will be soon. That is not my text this morning. As a trial judge, I do have a number of responses to the bill that I would like to express:

1) First, when one considers the issue of contempt, there is nothing about it that is particularly unique to the child custody context. Whatever may be said about limiting the length of time for which an individual may be incarcerated for civil contempt in a child custody case also applies to civil actions in general, that is, to all cases in which court orders are entered for the benefit of individual parties. S.1163 is limited to the child custody case; H.R. 2136, its companion bill, covers all civil cases.

2) The idea that a court should have the contempt power -- especially the power to incarcerate an individual or

threaten to do so if that individual will not comply with the court's orders -- is an extremely important one. If a court lacks that power, then individuals can bargain and barter with courts on their own terms in complete defiance of court orders and the result is anarchy, not law.

3) The civil contempt power really works. With extremely rare exceptions, the threat or actuality of incarceration does coerce individuals to respect court orders. In my experience during four years on the bench, I have never actually had to jail someone for contempt, but on the occasions when I have come close to doing so, compliance with my orders has been prompt and complete.

4) There is nothing inherently objectionable about a limit on incarceration for civil contempt, so long as the limit is not so short that the prospect of early release compromises the coercive purpose of the incarceration. A cap should probably not be less than one year. Eighteen months would not be unreasonable, nor would perhaps even three years be unreasonable.

5) The most troublesome aspect of a cap for civil contempt is what happens to the contemnor (the person who is found in contempt) after his release from confinement. Is he forever free? Does the underlying order that he was defiant of remain unenforceable thereafter? Can the contemnor be ordered again to get into compliance with the underlying order or be found in contempt anew if he refuses?

Consider, for example, this problem in the context of a case like the Morgan case, which is much in the news these days. See also People ex. rel Feldman v. Warden, 46 A.D.2d 256, 362 N.Y.S.2d 171 (App.Div. 1974). Let us modify the basic fact pattern in order to neutralize the observations I am about to make. Suppose a father has concealed a child from the mother, based on his opinion that the mother has emotional problems, even though the matter has been heard by a trial judge and no such conclusion was reached by the trial judge. If the father were to serve the maximum twelve months in jail provided in S.1163, would he then be free to withhold the child from the mother for the rest of the child's minority? Could he be reordered to produce the child following his release?

Here S.1163 and H.R. 2136 diverge radically. S.1163 would impose a twelve month cap and, assuming the sentence was properly imposed, things would apparently be at an end. The bill, as drafted, seems to preclude the possibility of a criminal contempt proceeding to follow. The contemnor would be able to defy the order and presumably would be immune thereafter from further prosecution. The child, in our hypothetical, could remain withheld indefinitely, despite the court's order to produce him.

H.R. 2136 addresses this problem more appropriately, I believe, in that it allows for a criminal contempt proceeding to follow the civil contempt. Under the scheme proposed by H.R. 2136, the civil contempt proceeding comes first, in which

the judge alone determines if a party has failed to comply with his order. If he so finds, he adjudges the person in contempt and puts him in jail until he agrees to comply. The criminal contempt proceeding, in contrast would involve a jury trial, with the presentation of evidence and argument before a different judge. The standard of proof would be proof beyond a reasonable doubt. In Re Gorfkle, 444 A.2d 934 (D.C.Ct.App. 1982). There the inquiry would be whether there has been a past willful noncompliance with the court's order and there the presiding judge would impose a sentence for the past act. As Justice Douglas characterized it in Penfield Co. of California v. Securities Exchange Commission, 330 U.S. 585, 594, 67 S.Ct. 918, 91 L.Ed 1117 (1947), criminal contempt punishes "yesterday's contemptuous conduct," while the coercive sanction of civil contempt announces "the consequences of tomorrow's contumacious conduct." 1/ In the District of Columbia, as in most States, a sentence for criminal contempt has no statutory limit and may thus be any sentence that is not otherwise cruel and unusual, i.e. it could be for two, three, or four years or possibly more. See Matter of Neal, 475 A.2d 390 (D.C.Ct.App. 1984) (16 to 48 month sentence on conviction for criminal contempt based on defendant's failure to testify before grand jury); see generally Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) (cruel and

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1/ Obviously civil contempt may have an incidental punitive effect. See Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441-442, 31 S.Ct. 492, 55 L.Ed. 797 (1911).

unusual punishments clause requires sentences proportionate to crime).

Allowing for criminal contempt proceedings and possible punishment serves an important purpose. It recognizes, consistent with the principle recognized in a number of cases, that at some point the coercive effect of civil contempt may come to an end and a substantial likelihood will arise that the contemnor will not comply with the underlying order that was the subject of the civil contempt order. See e.g. In Re Grand Jury Investigation, 600 F.2d 420 (3d Cir. 1979). Incarceration for civil contempt may become inappropriate either because its rationale is at an end, e.g. Shillitani v. United States, 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966), or because further incarceration becomes impermissibly punitive in nature, e.g. Catena v. Seidl, 65 N.J. 257, 321 A.2d 225 (1974) or possibly violative of due process, e.g. Lambert v. State of Montana, 545 F.2d 87 (9th Cir. 1976). But at the point that the individual's incarceration for coercive purposes ceases, he then becomes exposed to incarceration as punishment for his past willful noncompliance, for "yesterday's contemptuous conduct," as Justice Douglas would say.

An individual may thus decide to defy the law -- for reasons of principle or out of just plain stubbornness -- but there may still be a price to pay for doing that. The length of the sentence for criminal contempt may well vary with the nature and circumstances of the underlying order for which the

contempt is being pursued. Thus, where the underlying order is to make a child available to a parent, arguably the withholding of the child is comparable to a kidnapping which, under the law of most States, is regarded as a very serious felony, carrying a long potential prison term. Indeed, it may be possible for a prosecutor, following release of an individual upon expiration of the maximum period of time for civil contempt, to prosecute an individual for criminal contempt and then to prosecute the individual for some other criminal offense, based on the individual's noncompliance with the underlying court order, e.g. for kidnapping. See 17 C.J.S., Contempt, Sec. 59.

6) My final thought is that, in a sense, limiting the duration of incarceration for a civil contempt could, in practice, have some serious negative consequences for the contemnor. Knowing there is a one year cap as opposed to a term of indefinite duration for their defiance of a court order, more individuals might opt to suffer the incarceration for civil contempt. The result of shorter jail terms for civil contempt could be more frequent prosecutions for criminal contempt. Now so long as the contemnor is held indefinitely -- so long as he carries the keys of the prison in his own pockets," In Re Nevitt, 117 F. 448, 461 (8th Cir. 1902) -- he is releasable as soon as he complies with the underlying order. Once, however, he is prosecuted for the criminal contempt -- for his past willful noncompliance with a court order -- any subsequent decision by him to comply with the order will not automatically trigger his release from

prison. His sentence has changed from a conditional one to an unconditional one. He may have to serve his time by reason of the aggravated nature of his wilful noncompliance. And someone who has defied a court order for a number of years -- again, let us say, one who has withheld a child during the irreplacable years of its infancy -- may be felt by some judges to merit substantial punishment -- and that is the mode that one gets into in the criminal contempt phase -- wholly apart from that person's eventual decision to make the whereabouts of the child known. Compliance with a court order may be a factor in causing a court to reconsider its fixed sentence, but it is not necessarily a dispositive one. Similarly if noncompliance with the underlying court order is the basis of a separate criminal charge, e.g. kidnapping, the punishment upon conviction for that offense may also remain in place, despite the individual's ultimate decision to comply with the underlying order.

7) In sum, limiting jail time for civil contempt poses no problem in general. Once the incarceration loses its potential coercive effect, then the incarceration for that purpose should come to an end. However, sanctions for past noncompliance -- including the possibility of continued incarceration -- must remain available. Incarceration may become punitive at that point, but that is an appropriate and necessary response in order to maintain the respect for the law and the dignity of courts.

I close by citing a passage from Justice Frankfurter, in United States v. United Mine Workers, 330 U.S. 258, 312, 67 S.Ct. 677, 91 L.Ed. 884 (1947) (Frankfurther, J., concurring):

> In our country law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process. For legal process is subject to democratic control by defined, orderly ways which themselves are part of law. In a democracy, power implies responsibility. The greater the power that defies law the less tolerant can this Court be of defiance. As the Nation's ultimate judicial tribunal, this Court, beyond any other organ of society, is the trustee of law and charged with the duty of securing obedience to it.

All judges, state and federal, at both the trial and appellate levels, are trustees of law "charged with the duty of securing obedience to it."

Statement

of

Professor Doug Rendleman
Washington and Lee Law School

before the

SUBCOMMITTEE ON GENERAL SERVICES, FEDERALISM,
AND THE DISTRICT OF COLUMBIA

of the

COMMITTEE ON GOVERNMENTAL AFFAIRS
U.S. SENATE

on

S. 1163 and H.R. 2136

July 21, 1989

Mr. Chairman and Distinguished Members:

May it please the Committee. I am Doug Rendleman, Huntley Professor of Law and Director of the Lewis Law Center at Washington and Lee Law School.

I am pleased to help the Committee with S. 1163, a bill to limit coercive contempt confinement. With Professor Owen Fiss of the Yale Law School, I have published a law school casebook on Injunctions that is used for law classes in several law schools. It has a chapter on Coercive Contempt that contains a section about ending coercive contempt.

(I wrote an article entitled "Enough is Enough: Set Dr. Morgan Free" that appeared in the Legal Times in September 1988. In addition I read the brief filed for Dr. Morgan in the appeal now pending before the District of Columbia Court of Appeals. Finally I talked to Ms. Elaine Mittleman twice while she was serving as Dr. Foretich's attorney.)

The subject of coercive contempt bristles with technicality. I will try to address it in a nontechnical way. (A piece from Litigation magazine that takes up the technical distinctions is attached to my printed statement.)

Effective government means that people who win lawsuits are entitled to enjoy the fruits of victory. Judges use injunctions to protect citizens' rights like constitutional and civil rights that cannot be compensated with money. Contempt is an important way to enforce injunctions.

Coercive contempt is one tool judges use to help citizens who have been deprived of their rights. In addition to enforcing injunctions, coercive contempt is important in enforcement of the criminal law, particularly in grand jury investigations against organized crime.

Judges use coercive contempt as a threat to force people to obey lawful court orders and answer proper questions, in short to secure the conduct that the law says the winner is entitled to. The judge tells the person to obey the order or else, answer the question or else. If the person does not obey or answer, the "or else" happens. Coercive contempt may take several forms, but this committee is dealing with one form, confinement. Coercive imprisonment occurs when the judge holds the uncooperative person in contempt and finally orders him imprisoned until he obeys.

Confinement for coercive contempt is the judge's last-ditch effort. Coercion theoretically lasts only as long as the disobedience. This leads to the slogan about people who are imprisoned for coercive contempt: "You have the keys to the jail in your pocket."

Coercive contempt imprisonment can end in several ways. The contemnor may comply in the shadows of the prison walls. Or the

need for contemnor's compliance may end; for example someone else may produce the needed evidence. Third, the contemnor's inability to comply is a defense; the judge cannot imprison someone to "force" them to do the impossible.

Contempt imprisonment to coerce has an awesome potential for abuse. It concentrates government power to imprison in a single trial judge without the usual checks on criminal imprisonment: a grand jury indictment, prosecutorial discretion, a jury trial for a sentence of greater than six months, the presumption of innocence, proof beyond a reasonable doubt, and for coercive imprisonment, the opportunity for an executive pardon. Criminal sentences are for definite periods; but, in theory, if the coerced individual does not cooperate, coercive imprisonment might last forever.

Even though coercive contempt imprisonment is an important way to protect citizens' rights under law, we should recognize that there can be too much of a good thing, including coercion. As the theologian Niebuhr said, "It is because men are sinners that justice can be achieved only by a certain degree of coercion on the one hand, and by resistance to coercion and tyranny on the other."

The law does limit the way it protects a civil litigant's rights. Examples of arbitrary limits on creditors' rights are the statute of limitations and the exemptions statutes. If a creditor who is owed a just debt doesn't sue the debtor in time, the statute of limitations bars the creditor from suing. The exemption statutes say that a creditor who is owed a just debt must leave the debtor with a certain amount of property. In Virginia a debtor can reserve $5000 worth of property; so a debtor with less than $5000 may avoid paying the creditor anything. Legislatures have imposed these limits on creditors' rights for policy reasons that supercede the creditor's right to collect just debts.

There are also legal limits on contempt. Courts and legislatures have developed two principles of containment that limit coercive contempt imprisonment to prevent indefinite imprisonment from occurring. First is a judicially-developed doctrine. Coercive contempt imprisonment may lose its power to coerce and the uncoercible contemnor should be released. The reasoning is that coercive imprisonment has been transformed into a criminal punishment that was imposed without criminal procedure. O. Fiss and D. Rendleman, Injunctions 1097-1107 (1984).

Second is a legislative cap on coercive imprisonment. The federal recalcitrant witness statute limits coercive imprisonment to the life of the grand jury or 18 months, whichever is shorter. California limits coercive imprisonment to one year, Wisconsin to six months. Public Law Number 91-452, 84 Stat. 922, codified at 28 U.S.C. Sec. 1826; Cal.Penal Code Sec. 19a; Wisc.Stat.Ann. Sec. 785.04 (1)(b).

This committee is considering a legislative cap on coercive contempt imprisonment. (The proposed legislation has other effects. (1) Cap on Criminal Contempt: H.R. 2136 (b)(1) refers to "civil contempt." But S. 1163(b), lines 14-15 refers to "the contempt power described in subsection (a)" and may cap both criminal and civil imprisonment. (2) Cap on Direct Contempt: Both H.R. 2136 (b)(1) and S. 1163(b), lines 15-16 cap direct or in-court contempt at 12 months with the language "or for contempt committed in the presence of the court." If S. 1163(b) caps all contempt, see (1) preceding, that phrase is otiose.)

Capping coercive imprisonment resembles a statute of limitations or an exemption statute. The cap is based on the idea that for reasons of preventing harshness and potential arbitrariness, the government will go this far but no farther in protecting rights. The cap is a rule that applies to all coercive imprisonments based on the judgment that after a certain time, the legislative body presumes that coercive imprisonment is futile and destructive, a waste of the taxpayers' money and the contemnor's ability to contribute to society. It is the legislature's statement that after this time the burden on society and the uncooperative individual outweighs the potential benefit of his obedience.

I will next deal with two arguments against a legislative cap on coercive imprisonment: that the judicially developed doctrines suffice, and that a cap benefits a recalcitrant individual.

If a judicial doctrine to release uncoercible contemnors exists, why should Congress impose an arbitrary statutory cap on coercive imprisonment? There are several reasons why the judicial doctrine is unsatisfactory. People disagree about how much coercive imprisonment is too much, and the controversies excite strong feelings. Judicial decisionmaking is usually not effective at specific line-drawing. The judicially developed rules are imprecise. Lawyers cannot be sure what evidence to present or how to argue the issues. Trial judges are left at large about how to decide. The standard for appellate review extends a lot of deference to the trial judge's discretion.

In short the judicial doctrines commit too much unchecked power to a single fallible trial judge. Nothing guarantees that an individual trial judge will be convinced. The decision ends up depending on the particular judge's subjective choice. This leads to the conclusion that the result in a given case may depend on the length of that chancellor's foot.

The results of the lack of a statutory cap are potential arbitrariness, capriciousness, harshness, as well as futile imprisonments, judge shopping, and multiple litigation leading to inconclusive and unpredictable results. Citizens are confined unnecessarily. Respect for the courts and government declines.

It might be argued that a cap benefits a recalcitrant individual and impedes effective enforcement of rights. The cap

affects the effectiveness of coercive imprisonment. It allows a contemnor to make a calculated decision to serve a specified time rather than obey. As the time for contemnor's release approaches, the imprisonment's power to coerce him diminishes. The cap decreases the likelihood that a contemnor will give in during the fixed period.

Congress considered and rejected these arguments when it passed the recalcitrant witness statute as part of the Organized Crime Control Act of 1970. The reason seems to be that potentially indefinite coercive contempt imprisonment without criminal due process is too harsh, as well as potentially arbitrary and perhaps futile. The legislation prevents plaintiffs from punishing contemnors under the guise of coercion and without criminal procedural protection. 28 U.S.C. Sec. 1826.

An article in the Columbia Law Review by Mr. Berman points out that Congress chose an 18-month cap on coercive imprisonment because that was the maximum grand jury length when the Supreme Court decided the Shillitani case. That 18-month period is substantial; it is consistent with inducing obedience; it does not inhibit the effectiveness of the grand jury; and Congress knew that contempt may be repeated before successor grand juries. Later debates, Mr. Berman points out, were about whether to shorten the 18-month cap period to 12 or even six months and whether to bar contempt before later grand juries. If the recipient of a threat to imprison thinks it will be imposed, most threats will be effective; 18 or 12 or six months does not hamper judicial credibility. Note, Coercive Contempt and the Federal Grand Jury, 79 Colum.L.Rev. 735, 765-72 (1979); Shillitani v. United States, 384 U.S. 364 (1966).

Congress's decision in the recalcitrant witness statute to cap coercive contempt imprisonment is an appropriate model for states and the District of Columbia. If 18-months imprisonment suffices to coerce alleged participants in organized crime, a legislature could decide that a shorter cap period may be appropriate for coercive imprisonments that grow out of different -perhaps better- reasons for lack of cooperation.

Both S. 1163 and H.B. 2136 choose shorter periods. Moreover the experience under the recalcitrant witness statute means that Congress would be safe in using that as a precedent to cap coercive imprisonment in all cases, across the board. I favor the general H.R. 2136 which applies to all "civil contempt pursuant to the contempt power" over S. 1163 which is specifically targeted to contempt involving custody of a minor child. In my view, a uniform cap is more salutary because the next coercive imprisonment might affect a reporter claiming a source privilege or some other contemnor.

H.R. 2136 limits confinement to 12 months except if the authorities commence and maintain criminal contempt charges as the subsection sets out with a quick trial, a right to a jury, and a trial before a different judge. A lot may be said for

capping coercive imprisonment but providing that additional imprisonment could only be criminal and must follow criminal procedure. Mr. Berman suggested a hybrid proposal with criminal procedure that led to a period in which the witness could comply followed by a definite criminal sentence: "you have one week to obey; and if you don't, you are sentenced to six months." Note, Coercive Contempt and the Federal Grand Jury, 79 Colum.L.Rev. 735, 772-73 (1979). Coercive contempt imprisonment has been followed by a criminal contempt prosecution in extraordinary cases. United States v. Morales, 566 F.2d 402, 408-09 (2dCir.1977). O. Fiss and D. Rendleman, Injunctions 1106 (1984).

In my opinion, the H.R. 2136 procedure for the transition from coercive to criminal contempt is difficult to understand and will be cumbersome to effect. It will, I predict, not be utilized frequently and will mean an effective cap of 12 months. Perhaps the wiser course is for Congress to decide when to terminate coercive contempt and eliminate the technicality. S. 1163 chooses this course. This is the approach Congress took in Section 1826, the recalcitrant witness statute.

An expedited appeal from an order of coercive imprisonment is salutary; it protects a citizen who is wrongfully imprisoned without criminal procedure, and it provides what may be the first check on the trial judge's power. Time is a perishable commodity; delay equals denial. The federal recalcitrant witness statute tells the appellate court that appeals "shall be disposed of as soon as practicable, but not later than thirty days from the filing of the appeal." 28 U.S.C. Sec. 1826(b). From the point of view of someone wrongfully imprisoned, the requirement that the appellate court dispose of the appeal in thirty days is far better than the proposed requirement that it hear it in 60 days, S. 1163 Sec. 3.

Conclusions: Accommodating effective and positive government with individual liberties is one of Congress's crucial functions. Coercive contempt is a crucial judicial tool with an awesome potential for abuse. A statutory cap is an appropriate way to limit coercive contempt imprisonment. The cap may be limited to child custody, but it need not be limited; perhaps the wiser route is to deal with specific instances as part of the general problem. Congress's choice of 18 months for a statute dealing with organized crime may be longer than necessary; perhaps six or 12 months is a better way to approach the problem. New legislation might, consistent with the recalcitrant witness statute, provide for more expedited decisions.

I appreciate the invitation to present this statement and to answer questions about the subject of ending coercive contempt imprisonment. Thank you for your patience.

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How to Enforce an Injunction

by Douglas Rendleman

An injunction is not the end of a case in equity any more than a judgment is the last of a lawsuit. The defendant still must pay the money judgment or obey the injunction. The trouble is, the same recalcitrant spirit that led the defendant to disobey the law in the first place may re-emerge after the injunction. Most lawyers are familiar with some basic ways to enforce money judgments. But what about injunctions?

One of the most flexible ways to enforce an injunction is with the contempt power of the court. It permits a variety of different remedies that are available to creative lawyers and judges. But with its power comes a distinct set of hazards that careful lawyers need to avoid. This article outlines the way contempt can be used to enforce injunctions, and the right place to begin is with the injunction itself.

Injunctions are designed to prevent wrongs from occurring in the future. There must be a real danger that the harm will occur. To justify an injunction the wrong must have begun to occur or be about to begin. Traditionally, injunctions have been hard to get. They are troublesome to draft, administer, and enforce. So courts have preferred money damages to injunctions. They have insisted as a condition for an injunction that the damages remedy be inadequate or that the injury be irreparable with money. Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 Fla. L. Rev. 346 (1981).

But traditional views are changing. Our society has moved from merely protecting property and person to recognizing interests that may be difficult to touch and see, but that we understand are important. Increasingly, tort plaintiffs recover for fright, shock, and mental anguish. Legislatures have developed statutory remedies against racial and sexual prejudice. And businesses sue to vindicate interests in customer relationships and good will. As we recognize the less tangible interests, the injunction has naturally become a more common remedy. When a judge says that the remedy at law is inadequate, he means that the plaintiff's rights are too important or too difficult to value in money. In other words, the interest is too valuable to allow the defendant to violate it and simply pay damages for the harm.

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Judges routinely enforce antitrust, copyright, patent, trademark, securities, and civil rights statutes both with damages to pay for past harm and with injunctions to prevent harm in the future. Injunctions govern prisons and jails in more than half the states, and many school systems operate under a court's injunctive eye.

Contempt is the most potent remedy to enforce injunctions. Understanding its flexibility and appreciating its drawbacks starts with the three basic classifications of contempt. They are:

- Direct and indirect;
- Civil and criminal; and
- Prospective and retrospective.

The first distinction is whether the contempt is direct or indirect. The answer hinges on geography. Direct contempt is rash or unseemly behavior in the courtroom. Punishment for excessively zealous advocates and obstreperous parties or spectators is what most trial lawyers think of when they hear the word "contempt." But this form of contempt has only slight relevance to remedies to enforce injunctions.

Indirect contempts occur when someone breaches a personal order out of court. Since most violations of injunctions occur out of court, most enforcement contempts are indirect. Enforcement contempt may be direct, however, such as an order to sign a deed or a direction of the court to testify in a proceeding.

The distinction between direct and indirect contempts results in an important procedural difference. The judge may punish one guilty of direct contempt on the spot without pausing for preparation, negotiation, or second thoughts. The dignity of the judicial process sometimes requires the power to act without delay. The indirect contemnor, on the other hand, is entitled to notice and a hearing. Dobbs, *Contempt of Court: A Survey*, 56 Cornell L. Rev. 183, 221-30 (1971).

If one must be in contempt, it is preferable (from a procedural standpoint) to be an indirect contemnor. The attorney who was late for a hearing may argue that every minute of the violation necessarily happened out of court. The in-court contemnor, on the other hand, may seek another form of procedural protection. He may assert that the contemned

judge was too personally involved and so the contempt should be tried before another judge.

The civil or criminal distinction turns on the remedy imposed for the contempt. There are generally three forms of contempt remedy, which can be explained by a simple hypothetical situation. Assume that Mr. Pollard and Miss Dobie dispute who owns a unique 1948 Studebaker. The court decides that Pollard owns the vehicle and enjoins Miss Dobie not to disrupt Pollard's quiet possession. Miss Dobie inserts her spare key in the ignition, starts the engine, and drives the Studebaker away. The legal system's response to her might be under the criminal law for larceny, the tort law for conversion, and contempt for disobeying a court order.

The contempt remedies against Dobie roughly parallel the legal remedies. First, the court may find Dobie in criminal contempt and fine her $500. The sanction is determinate and irrevocable. Its purpose is to deter Dobie and others from thwarting court orders and to punish her for disrespect of the court order. Second, the court may enter a compensatory contempt award against Dobie; the judge may order her to pay Pollard for the harm she caused by disobeying the injunction. The judge will award damages such as the value on the date of the wrong or the cost of renting a substitute, and will also give the cost of enforcing the injunction, including attorneys' fees and costs. Rendleman, *Compensatory Contempt: Plaintiff's Remedy When a Defendant Violates an Injunction*, 1980 U. ILL. L.F. 971.

A compensatory award is intended to restore lost money to the plaintiff and to make enforcement costless. Many compensatory contempts grow out of injunctions that protect copyright, patent, and trademark proprietors. A minority of jurisdictions, led by California, reject the notion of a compensatory contempt. Instead they remit plaintiffs to a second action for damages against the injunction's violator.

Coercive contempt is the third type of remedy. If Miss Dobie refuses to return the car or to tell where it is, the court might say, "I fine you $100 per day until Pollard has the Studebaker." While the criminal and compensatory remedies are analogous to the criminal law and the legal remedy for money, coercive contempt is unique to personal orders. The closest parallel is the original injunction. The judge wields coercive contempt against a defendant because a monetary remedy is inadequate. The goal is to secure the conduct from the loser to which the winner is entitled. A coercive contempt order is a revocable, indeterminate threat. If the contemnor complies, the coercive sanction never even starts. In other words, coercive contempt resembles a second injunction with the penalty for a breach specified in advance. O. Fiss & D. Rendleman, Injunctions Ch. 13 (1983).

Compensatory and coercive contempt comprise civil contempt. The difference between civil contempt and criminal contempt is procedural: Coercive and compensatory contempts generally follow civil procedure whereas criminal contempts follow criminal procedure. In each instance there are important differences. Civil contempts have no jury, and the burden of proof is "clear and convincing evidence." In criminal contempt there is no indictment, but otherwise the full protection of criminal procedures applies.

So far we have talked about the first two distinctions – direct and indirect contempts, and civil and criminal contempts. The next classification is whether the contempt is prospective or retrospective. Criminal and compensatory are the

two forms of retrospective contempt. Retrospective contempt confesses failure; the defendant breached the injunction and the judge can no longer secure for the plaintiff the conduct he is entitled to. So the judge substitutes money compensation or sanctions against the wrongdoer. Because it is too late to force the appropriate conduct, compensatory contempt includes an additional irony: The judge must use the "backward-looking" money remedy to advance (or at least not retard) the idea that money is an inadequate remedy to protect the plaintiff's interest.

Coercive contempt is the prospective remedy that the judge uses to get future conduct from the loser. The judge will fashion a forward-looking plan to protect the plaintiff. The normal devices are threats to fine or imprison. Coercive contempt varies from mild to severe. The threat to fine Miss Dobie $100 per day may work. She may turn in the Studebaker and the fine will never start. At this level observers find it difficult to distinguish coercive contempt from injunctions.

On the other hand, no upper limit except credibility constrains coercion. To achieve compliance, the judge may threaten things that he would hesitate to impose. A coercive order should exceed the projected compensatory award. The reason is that the judge wants the threat to obviate the need for the award. Similarly, a threat may exceed the projected criminal sentence because if the threat works, it will not be employed. When the judge tells Miss Dobie that she has the keys to the jail in her pocket, he means that a fine or imprisonment is incremental and that Miss Dobie (at least theoretically) controls how long the coercion will last. If the $100 daily fine fails to produce the Studebaker in a fortnight, the judge may also order her imprisoned – to quicken her conscience and to jar her memory. After six months of coercion without producing any car, the judge may feel chagrined. If the fact-finding that led to coercion went awry or if the contemnor suffers from terminal stubbornness, then the coercive measures may last forever. At this level, coercive contempt resembles a criminal sanction of indefinite duration.

The strategies for convincing the court to enter a contempt order rise from the basic distinctions: direct and indirect, criminal and civil, and prospective and retrospective contempts. They also depend on the nature of the injury sus-

(Please turn to page 52)

Enforce an Injunction

(Continued from page 24)
tained by the party for whose benefit the injunction was ordered in the first place.

The first step is to review the injunction order and determine if the conduct of the defendant violated it. Is the injunction clearly worded, and can you prove the violation by clear and convincing evidence?

The second step is to evaluate which of the classifications of contempt will be most helpful to your client. This can be a difficult issue, calling for subjective judgment. I suggest that you ask yourself these questions:

1. Has the conduct caused significant monetary damages? If it has, you should consider including a request for a compensatory award.
2. Is the defendant a member of a class of persons likely to engage in the same type of conduct? If so, you should consider asking for a criminal contempt remedy.
3. Even if there is no such class of persons, is there still a strong possibility that the defendant will continue the improper conduct and the compensatory remedy will not induce compliance with the injunction? Then consider requesting a prospective remedy. This might be the situation in which the defendant is wealthy or compensatory damages are minimal. It would also cover cases in which – apart from the wealth of the defendant or the size of the compensatory damages – the possibility of severe damages in the future is substantial.

Which Procedure

The most important and difficult question relating to procedure is whether criminal or civil contempt will be requested. This is because a judge cannot follow civil procedure and then impose a criminal sanction. The lesson of scores of appellate decisions reversing contempt sanctions is clear: If any chance of a criminal sanction exists, the judge ought to follow criminal procedure. Since contempt remedies may be combined, the judge may follow criminal procedure and impose compensatory and coercive remedies in addition to a criminal contempt. *In re Herndon*, 325 F. Supp. 779 (M.D. Ala. 1971); *Hadrott v. Ormos*, 325 F. Supp. 777 (M.D. Ala. 1971).

From this you might conclude that, when in doubt, the best course is to follow criminal procedure. That is not always true.

Criminal procedural protections may prejudice a private plaintiff. The privilege against self-incrimination, for example, may stifle important discovery and testimony. On the other hand, there may be an advantage to using criminal procedure. The plaintiff may seek to schedule the hearing for compensatory or coercive contempt after the criminal hearing. If the defendant is found guilty, the fact of the violation is established, and only the appropriate remedy needs to be litigated. If the defendant is not convicted, that does not mean the plaintiff has lost. The judge may exonerate the defendant for criminal contempt and still impose coercive or compensatory sanctions on the ground that the contempt was proved by clear and convincing evidence but not beyond a reasonable doubt. Although the practical chance of that happening is slight, the difference in the burdens of proof make it a possible result. *Norman Bridge Drug Co. v. Banner*, 529 F.2d 822, 830 (5th Cir. 1976).

While the basic outline of contempt remedies and procuedure is clear, confusion reigns on the margins. An academic observer might blame hair-triggered trial judges and inastute attorneys. But after reflection he will conclude that the confusion exists because the distinctions are difficult and the policies are imprecise. Punishing, compensating, and coercing are separate only in the abstract.

Any punishment changes future incentives. A defendant who pays a fine is less concerned about who receives the money than how much it costs. Even if a person is jailed to punish past conduct, deterrence theory teaches us that he is less likely to repeat the conduct that led to imprisonment. The border between coercive contempt and criminal contempt is hazy today because imprisonment to coerce imposes a severe burden. In fact, many courts require criminal procedural protections – including a public trial and appointed counsel for indigents – before ordering a coercive contempt. *In re Roshan*, 671 F.2d 690 (2d Cir. 1982).

Open Disdain

Return once more to our hypothetical problem, and assume that the judge tells Miss Doble that she must turn in the Studebaker within ten days or she will be imprisoned for six months. After she disdains to comply and the sentence starts, Pollard finds his car. The court had two opportunities to follow criminal procedure: at the start of the ten days and at the start of the six months. If he followed criminal procedure once, must she complete the sentence? If both hearings were civil, does she walk when Pollard drives? It illustrates the difficulty in sorting out the legitimately conflicting interests that the remedy of contempt can sometimes pose.

My purpose is not to answer all the questions, but rather to suggest that understanding the basic distinctions in the law of contempt will help thoughtful lawyers choose the most appropriate remedies in enforcing injunctions.